

1158

[illegible]

Date _____

K. UNIVERSITY LIBRARY

This book should be returned on or before the last date stamped above. An over-due charge of .06 P. will be levied for each day. If the book is kept beyond that day.

DONATED

By

PANDIT SHAMBOO NATH DAR,
(1901 — 1969)

ADVOCATE,

and former President

SRINAGAR MUNICIPAL COUNCIL

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

DONATED

By

PANDIT SHAMBOO NATH DAR,
(1901 — 1969)

ADVOCATE,

and former President

SRINAGAR MUNICIPAL COUNCIL

G. N. Dar
Advocate
Jammu & Kashmir
Srinagar.

G. S. G. S.
Advocate High Court
Jammu & Kashmir
Srinagar

THE LAW OF MERCANTILE USAGES IN INDIA

BY

SHRI GOPAL SINGH, M. A., LL. B.

U. P. Civil Service (Judicial).

1939

**M. HAR PARSHAD ELECTRIC PRESS,
BULANDSHAHR.**

G. N. D.
Advocate & Solicitor
Jammu & Kashmir
Srinagar.

Looks
Check

346.07
G 646L

12:30

S. V. 02

PRINTER M. HAR PARSHAD:
M. HAR PARSHAD ELECTRIC PRESS.
BULANDSHAHR.

Rs. 5/-

S. N. D.
Advocate High Court
Jammu & Kashmir
Srinagar.

FOREWORD

A couple of years back Mr. Shri Gopal Singh, a member of the U. P. Judicial Service, saw me and expressed his intention to write a book on the Law of Mercantile Usages in India and I welcomed the idea. The author is to be congratulated on his present venture. The Mercantile Usages of all countries are complicated and full of technicalities; it is all the more so in India where commercial transactions even upto the present times often take very imperfect shapes.

The book deals with a difficult subject of the development of the trade usages and customs. Great pains have been taken in exploring this virgin soil unaided apparently by any precedent in a number of cases. The book is very exhaustive and the arrangement is excellent. I have read portions of it and have tested the notes and case law referred to therein and the latter has been brought up to date.

The language and the method of treating this difficult subject is simple and even a layman will find no difficulty in understanding the various chapters of the book.

Easy illustrations have been given to explain the various types of Hundis, Teji, Mandi or Teji-Mandi transactions, entries in different types of Bahi-Khata maintained by the business people of this country according to the Mahajani system. The author has embodied in his book a useful discussion about the working of the Trade Chambers which are of recent growth in these Provinces and which are becoming more and more important in business life from day to day.

The notes have been arranged under appropriate headings and the book is bound to be very useful to the Bench and the Bar alike.

UMA SHANKER BAJPAI

Puisne Judge,

HIGH COURT OF JUDICATURE AT

ALLAHABAD.

Dated, Allahabad.
30th November 1939

**THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.**

DATE LOAND

Class No. _____ **Book No** _____

Vol. _____ **Copy** _____

Accession No. _____

--	--	--

PREFACE

With the development in the means of communication there has been a rapid growth in the commerce and industries of India. This awakening has been followed by the unavoidable evil of multiplicity of commercial disputes. The difficulties which arise from the meagreness and incompleteness of enactments dealing with commercial practices in India have been increased by the comparatively small number of decided cases affording matter for defining and systematizing this branch of the law. On some points there is no authority at all and of the decisions some depend upon the circumstances of the particular case and some are irreconcilable with one another. This work has been undertaken to meet the long standing want of a legal guide incorporating concisely and systematically the law relating to mercantile usages in this country. The book having been written during the scanty leisure which could be snatched from the performance of the official duties, the author is the first to admit that this humble effort of his must have many short-comings for which the indulgence of the readers is earnestly requested.

The primary object of the book is to discuss the mercantile usages and the law relating to them but in order to make the book really useful and comprehensive the allied commercial practices which are universally followed have also been included.

A note of apology is entered here for the inclusion of foreign rulings but their quotation could not be avoided without impairing considerably the usefulness of the book. The reasons are two fold. In the first place, the Indian mercantile law has been drafted on the pattern of the Acts in England. Secondly, western practices are being implanted in India and consequently the law relating to them must also govern the trade conventions imported in this country. Foreigners who are carrying on trade in India have brought with them their own modes and conventions and carry on

business subject to the usages to which they have been accustomed. The English law therefore has been quoted wherever found instructive, but endeavour has been made to cite Indian cases as far as possible. Every effort has been made to make the book exhaustive and upto date. Should the present attempt of the author render some help in the disposal of commercial disputes and throw a ray of light in the clarification of the law on the subject he would consider his labour amply rewarded.

The author desires to express his grateful appreciation to all those who have kindly assisted him in the preparation of the book by their valuable suggestions.

OCTOBER 1939

SHRI GOPAL SINGH

G. N. Das
Advocate in Court
Jammu & Kashmir
Srinagar

TABLE OF CONTENTS.

	Page.
Introduction ...	1

CHAPTER I.

THE NATURE AND CLASSIFICATION OF CUSTOM AND USAGE.

Nature of custom	7
Custom and law	7
Custom and prescription	8
Essentials of a custom	8
Trade custom	9
Pleading of custom	9
Proof of custom	10
Effect of custom	11
Usage	11
Definition of usage	11
Characteristics of usage	11
Difference between a custom and a usage	12
Usage and contract	12
Proof of usage	13
Classification of custom and usage	13
Chain of middlemen	13
Marketing agencies	13
Vyopari	14
Species of vyopari	14
Arhatia	14
Cottage industries marketing	15
Karkhanadars	15
Large scale dealers	15
Financing agencies	15
Sahukars	15
Sharrafs	16
Banking agencies	16

CHAPTER II.

ARHATIA

	Page.
Meaning of arhatia	17
Pakka arhatia	17
Conception of a pakka arhatia	18
Incidents of a pakka arhatia	24
Kachcha arhatia	26
Nature of kachcha arhatia	27
Incidents of a kachcha arhatia	29
Distinction between pakka and kachcha arhatia	30
Comparison of a pakka arhatia, with a delcredere agent	31
Pakka arhatia compared with mercantile agent	33
Comparison between a pakka arhatia and his client with purchaser and seller	34
Difference between a pakka arhatia and broker with personal liability	34
Duties of an arhatia	34
Duty to carry out the instructions of his principal	34
Exceptions to the rule	35
Duty to follow the customs of the business	36
Duty to exercise due care	36
What is reasonable care	37
English law	37
Indian Law	37
Duty to keep and render account	39
Suit for accounts	40
Place of accounting	41
Limitation for pakki arhat transaction	44
Duty to seek instructions	46
Duty to pay money of the principal in the hands of the agent	46
Duty not to use information obtained in the course of the agency against the principal	47
Duty not to set up adverse title	47
Attachment of defaulting agent	48
Agent's liability on defaults of co-agents and sub-agents	48

Duty not to deal on his own account ..	48
Pakka arhatia liable for the performance of the contract	50
Rights of an arhatia ..	50
Right of remuneration ..	50
Claim for money paid by the agent on behalf of the principal	50
Claim for damages by the agent ...	50
When right to remuneration arises ...	51
Right of lien	53
Lien in illegal transactions	54
Sub-agent's lien	55
Extent of the lien	55
When lien becomes extinct	55
Right of indemnity	56
Lawful act	56
Within the scope of his authority ..	57
Right to enforce the contract against the principal	58
Pakka arhatia's right to call for margin money	58
Liability of the constituent to third persons ...	59
Principal bound by the acts of the agent ...	60
Ostensible authority of the agent ...	60
Doctrine of estoppel	61
Ratification by the principal	62
Exception	62
Misrepresentation and fraud committed by the agent	63
Does admission of the agent bind the principal ...	64
Information to the agent binds the principal ...	64
English law	64
Indian law	65
Essentials of the doctrine	65
Even undisclosed principal liable for the contracts of the agent	67

	Page
Liability of the principal even when the agent is liable	67
Indian Law	67
English Law	68
Principals claim is subject to the equities existing between the agent and the third party	69
Liability of arhatia to third parties	70
Personal liability	70
Liability for breach of warranty	72
Benefit to the principal	74
Measure of damages	74
Agent acting for himself cannot enforce performance of contract	75
Pakka arhatia and wagering contract	75
Validity of the custom of pakka arhatia	75
Burden of proof of the usage of pakka arhatia	81

CHAPTER III.

DEALINGS IN FUTURE.

Kinds of transactions	83
Advantages of speculation	83
Wagering contract	85
English law of wagering contracts	86
Indian Law	86
Bombay Act III of 1865	86
Ingredients of wager	87
Collateral agreements in wagering contract	89
Bull and bear	91
Kharid ka sauda and bech ka sauda	91
Speculative and Badni transactions	92
Methods of settlement	93
Sai and chuk	94
Tampering the market	94
Teji, Mandi or Teji-Mandi transactions	95
Teji contract	95
Mandi contract	96

	Page.
Teji-Mandi transaction	96
Nazrana transaction	99
Put-call Put and Call transactions	101
Single option	101
Double option	103
Failure to exercise options	106
Are speculative and Teji-Mandi transactions wagering contracts	107
Speculative transactions and wager	107
Teji Mandi transactions and wager	108
Nazrana contracts and wager	111

CHAPTER IV.

BROKER.

Who is a broker	112
Difference between a broker and other mercantile agents	112
Nature and extent of the authority of the broker	112
Rights of a broker	113
Right of remuneration	113
When he is entitled to his commission	113
Case of employment of several brokers	115
Amount of remuneration	117
Element of time in the business of a broker	117
Right of remuneration in wagering contract	118
Right of indemnity	118
Right of lien	118
Right of action and personal liability of broker	119
Ratification and its nature	121
Ingredients of ratification	121
Duties of a broker	125
Duty to contract in the name of principal	125
Duty is subject to the usages of the market	125
Duty to inform	126
Duty to exercise due care	126
Duty not to deal on his own account	126
Duty to complete the bargain before claiming brokerage	126

CHAPTER V.

HUNDI.

	Page.
The advantages of hundi	129
Component parts of a hundi	130
Kinds of hundi	131
Darshani hundi	131
Its form	132
Muddati hundi	133
Its form	133
Bill of exchange and its form	134
Shah Jog hundi	134
Its form	135
Nam jog hundi.	135
Nishan jog hundi	135
Dhani jog hundi	135
Its form	135
Farman jog hundi	136
Jokhmi hundi	136
Example of jokhami hundi	136
Jawabi hundi	137
Zikri chit	137
Purza	137
Khokha	137
Peth, per-peth and majar-nama	137
Their forms	138
Nature of Jokhmi hundi	139
Rights and liabilities of the parties of the jokhami hundi	139
Distinction between a shah jog and a jokhmi hundi	140
Nature of a hundi	141
Promissory note and hundi	142
Bill of exchange and hundi	142
Limitations of a hundi as a bill of exchange	143
Local usages	143
Section 25 of Indian Paper Currency Act	143

TABLE OF CONTENTS

IX

	Page
Is a shah jog hundi payable to bearer	144
Cheque and hundi	147
Peculiarities of a shah jog hundi	149
Parties to a hundi	152
Drawer	152
Drawee	152
Drawee in case of need	152
Acceptor	152
Essentials of a valid acceptance	152
Acceptor for honour	153
Essentials of valid acceptance for honour	153
Payee	154
Persons entitled to sue	155
Holder in due course	156
Rights and liabilities of a drawer	158
Rights of a drawer	158
Liabilities of a drawer	158
Rights of a drawee	159
Liabilities of a drawee	160
Rights and liabilities of an acceptor for honour	161
Rights of a holder	162
Persons entitled to receive payment on a hundi	165
Duties of a holder	168
Privileges of a holder in due course	170
Rights of an agent	171
Agent of a mercantile firm	173
Joint Hindu family trade	173
Agent exceeding his authority	173
Liabilities of an agent	175
Local usages to exclude the liability of agent	176
Agent for collection	176
Rights of a donee	177

CHAPTER VI.

HUNDI (CONTINUED)

Negotiation	178
-------------	-----

G. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

	Page.
Endorsement	179
Nature of indorsement	180
Delivery of a hundi	181
Nature of delivery	181
Actual delivery	181
Constructive delivery	182
Delivery by post	183
Persons entitled to make delivery	183
Maturity of a hundi	184
Days of grace	184
Method of calculation	185
Rahi miti and gayi miti	186
Presentment of a hundi	186
Method of presentment	187
Who can present	188
To whom presentment should be made	188
Time of presentment	189
Khari hundi	189
Place of presentment	190
When presentment can be excused	190
When presentment unnecessary	190
Effect of non-presentment	192
Acceptance	193
What is acceptance	193
Essentials of a valid acceptance	193
Kinds of acceptance	193
Conditional acceptance	193
Qualified acceptance	193
Qualification as to time	194
Qualification as to place	194
Qualification as to parties	194
Partial acceptance	194
Who can accept	195
Essentials of acceptance for honour	195
Forged endorsement	195

TABLE OF CONTENTS

XI

Page.

Drawer's name forged	...	...	195
Bills drawn in a fictitious name	...	...	195
Failure of consideration	...	...	196
Partial failure of consideration	...	...	198
Discharge of a hundi	...	...	199
Payment of a hundi	...	...	200
How payment should be made	...	...	200
By whom payment is to be made	...	...	200
To whom payment is to be made	...	...	201
Rights of a payer	...	...	201
Cancellation of the instrument	...	...	202
Release	...	...	203
Discharge by satisfaction	...	...	204
Discharge by operation of law	...	...	204
What is material alteration	...	...	205
Instances of material alteration	...	...	206
What is not a material alteration	...	...	207
Effect of material alteration	...	...	209
Suit on original consideration in case of altered or insufficiently stamped instrument	...	...	209
Dishonour of a hundi	...	...	211
Dishonour by non-acceptance	...	...	212
Dishonour by non-payment	...	...	212
Notice of dishonour	...	...	213
Application of the rule to hundis	...	...	213
Object of the rule	...	...	214
Who should give notice	...	...	214
To whom notice should be given	...	...	215
Necessity of notice	...	...	216
Mode of giving notice	...	...	217
Contents of a notice	...	...	217
How notice should be sent	...	...	218
Consequences of default in giving notice	...	...	218
When notice of dishonour is unnecessary	...	...	218
Noting and protest	...	...	221
Special rules relating to bills of exchange	...	...	221

	Page
Interest	221
Burden of proof about exemption from giving notice of dishonour	222
Reasonable time	222
Compensation	223
Nakrai Sakrai charges	224
Presumptions	225
Presumption of consideration	225
Presumption as to date and place	227
Presumption as to time of acceptance	227
Presumption as to time of transfer	227
Presumption as to order of endorsement	227
Presumption as to stamp	228
Presumption as to holder in due course	228
Presumption on protest	228
Rules of estoppel about a negotiable instrument	228
Estoppel against denying validity of instrument	228
Estoppel against denying capacity of payee to endorse	229
Estoppel against denying capacity of prior party	229
Nature of an attested shah jog hundi	230

CHAPTER VII.

THE SYSTEM OF BAHİ KHATA.

Nam and Jama (Debit and Credit)	231
Illustration	232
Rokar (Kachcha and Pakka)	232
Example of posting in a Rokar Bahi	233
Rokar milana	233
Batau or discount	234
Entry of credit dealings in the Rokar	235
Example of the same	236
Khata	236
Form of khata	237
Kinds of khata	238
Muldhan khata	238

	Page.
Batau hundiawan khata	239
Mal khata	239
Its illustration	239
Kharch khata	240
Uchant khata	240
Batta khata	240
Hamare gharu khata	240
Tumhare gharu khata	240
Customers' khata	240
Personal khata	241
Ankra	241
Its illustration	241
Kachcha khata and pakka khata	241
Naqal Bahi	241
Ankra jama kharch	242
Bijak jama kharch	242
Upana or Bikri jama kharch	242
Entries of forward transaction	243
Entries of Bijak	243
Form of bijak	243
Bikri jama kharch	244
Form of bikri jama	245
Entries of settlement of forward transactions	245
Examples	246
Kachcha and pakka naqal	249
Other commercial Bahis	249
Roznawan Bahi	249
Roznamcha Bahi	249
Diary	250
Monda Bahi	250
Sauda Widh or Sauda Bahi	250
Sauda khata	250
Jama Bahi	250
Ankra Bahi	251
Bilti Bahi	251

	Page
Byaj Bahi	251
Chitthi Bahi	251
Signs and notations used in bahi khata	251
System of calculation of interests	251

CHAPTER VIII.

LAW RELATING TO BAHI KHATA.

Evidentiary value of Bahi Khata	254
English Law	254
Book of account	254
Regular account book	255
Accuracy of entries in an account book	255
Accounts regularly kept in course of business	255
Absence of entry in an account book	256
Corroboration of an entry in an account book	257
Plaintiff's statement as corroboration	258
Book keeper's statement as corroboration	259
Appreciation of the value of account books	259
Value of account books without corroboration	260
Value of various kinds of bahi khata	262
Mutual, open and current account	262
Open and current account	262
Mutual account	263
Article 85 Limitation Act	264
Instances of mutual, open and current account	264
Test of mutual, open and current account	265
Illustration	265
Account settled	266
What is not a settled account	267
Re-opening of account	267
Re-opening of account in fiduciary relation	267
Re-opening of account due to fraud by an employee	268
Re-opening of account in case of excess payment	268
When settled account cannot be re-opened	269
Extent of re-opening of account	269
Account stated	270

	Page
Meaning of account stated	270
Essentials of an account stated ...	271
Varieties of account stated and their consequences ...	273
Whether an account stated constitutes a cause of action	273
Account stated and limitation	273

CHAPTER IX.

WORKING OF CHAMBERS.

Functions of chambers	275
To promote interest of trade	275
To supervise deliveries	275
To regulate the transaction of business ...	276
To fix charges	276
To keep schedule of prevailing prices ...	278
To keep deposits of margin and cover money ...	278
Defects of the system	278
To decide commercial disputes by arbitration ...	280
Arbitration tribunals	280
Reference of future disputes to arbitration ...	284
Matter in dispute	286
Reference to an unnamed arbitrator	288
Scope of paras 7 and 20 Sch. II C. P. C. ...	289
Enforcement of award in illegal contracts ...	290
Persons who can enter into the contract of arbitration	290
Conflict of jurisdiction	292
Instances where stay has been refused	293
Regular suit to enforce an award	295

CHAPTER X.

USAGES OF PARTICULAR TRADES IN INDIA.

Agents custom in Calcutta	296
Bombay silver market	296
Bought and sold notes in Calcutta	296
Broker's gala	296
Brokerage in metal trade in Mirzapur	297
Carriers: Insufficiency of packing	297

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

	Page
Cattle grazers in U. P.	297
Chattis in Garhwal Division	298
Cotton trade in Tuticorin	298
Cotton Satta in Bombay	298
Diya or lamp in a khatti	299
Exchange Banks in Calcutta	299
Kachcha and Pakka bidding by agent	299
Method of examining Jute Bales and ascertaining damages	300
Naya Nagar Arath	300
Payment of price to metal traders in Mirzapur	300
Stock exchange broker	301
Shellac trade	301
Tulai System in U. P.	303
Usage of Bombay importer	303

APPENDIX I.

USAGES OF PARTICULAR TRADES RECOGNIZED IN ENGLAND.

Agricultural customs	304
Auctioneers	305
Architects	305
Bacon trade	305
Barley and Malt trade	305
Bleachers	306
Book Sellers	306
Brewers	306
Brush trade	306
Builders	307
Butter trade	308
Calico trade	308
Cloth trade	308
Coach builders	308
Coal trade	309
Corn trade	309
Cotton trade	310
Cycle trade	310

	Page.
Diamond trade	310
Drug trade	310
Dry goods trade	310
Estate Agents	311
Fruit trade	311
Fur trade	311
Glovers	311
Hat trade	311
Hop trade	311
Horse dealer	312
Horse racing	313
Iron and coal trade	313
Inn keepers	314
Linen trade	314
Oil and oil seeds trade	314
Packing trade	315
Piano trade	315
Pottery trade	315
Printing trade	315
Provision trade	315
Rice trade	316
Servants	316
Stone trade	317
Tea and Coffee trade	317
Timber trade	317
Tobacco trade	318
Ware-house-men and whar-fingers	318
Weaving trade	319
Whaler	319
Wine and spirit trade	319
Wool trade	319
Australian wool trade	320

APPENDIX II.

COMMERCIAL VOCABULARY

General terms and abbreviations	321
---------------------------------	-----

	Page.
Terms used in Banking and Commission agency ..	325
Terms used in Brass and Copper trade ..	327
Terms used in Grain trade . . .	327
Terms used in Gold and Silver trade ...	331
Terms used in Lac and Shellac trade ...	332
Terms used in Money market ...	335
Terms used in Silk fabrics trade ...	337
Terms used in Stock and Share market ...	339
Terms used in Wire and Tinsel trade ..	340

INDEX.

Index	343-355
--------------	---------

J. N. Das
 Advocate High Court
 Jammu & Kashmir
 Srinagar.

LAW OF MERCANTILE USAGES

INTRODUCTION.

Customs and usages have always played an important part in the business life of India. Before the birth of the modern legislatures and the establishment of British courts, commercial machinery in India was run by private contracts which were always made subject to a horde of prevailing customs except for a few simple commandments either from the King or the Scriptures. The result is that a large number of customs and usages are to be found prevailing throughout the country. Owing to the vast expanse of territory in India and to the difficulties of communication particular customs tended to be localized, but it is note-worthy that they have been similar in character over wide areas although varying in details according to the requirements of different localities. Since the time that commercial dealings began with Europe the practices in India have been considerably influenced by the modes and dealings of foreign countries. Indigenous customs were modified and new usages were imported. The legislatures have passed only a few Acts incorporating the cardinal principles of Mercantile law. They are still silent about the usages which are supposed to supplement the law of the land. It is, therefore, useful to ascertain the extent and the nature of these usages. Opinion has been sharply divided in India as to whether the prevailing customs should be incorporated into enactments or left merely as customs. It is probably for this reason that much of codification has not yet been attempted. To quote by way of illustration, the question came up for discussion at the time of the passing of the Negotiable Instruments Act. One party favoured the inclusion of the usages in the Act with a view to secure uniformity and precision throughout the country. The other party was opposed to it. It was ultimately considered that mercantile notions fixed by customs and usages would be rudely shocked by their arbitrary inclusion in the Act as legal provisions. The customs, therefore, were left aside by the introduction of a saving clause in the Act. The codification results in the rigidity of rules the suitability of which on ever-changing world is constantly tending to outgrow

Advocate High Court

Jammu & Kashmir

Srinagar

It would be useful if a digest could be prepared of the existing mercantile customs and usages in the country after a thorough enquiry in business circle. This digest would have the advantage of making the customs precise in their nature and definite in their mode of operation. Speculation in litigation would be greatly reduced. It would also avoid the risk of depriving usages of their elasticity. The main ascertainable sources of customs and usages are now to be found in the judicial pronouncements scattered over the voluminous law reports and the unwritten law prevailing among merchants which they implicitly respect in all commercial dealings. The case law on the subject is not much in comparison with the vastness of the country and the volume of trade carried on therein. The usages contained in the second class, about which no ruling of a law court is to be found, are still in a fluid stage. The chambers of commerce which have sprung up all over the country have tried to incorporate some of them in their bye-laws and rules of business. But they are no more than regulations of guilds, incomplete in scope, untested from a juridical point of view, and devoid of all sanction except for the willing obedience of their members. There are some rules which give a twist to the mercantile practices in favour of the members and work to the prejudice of the outsiders. Thus, it cannot be said that the business rules of the chambers always incorporate the exact mercantile usages prevailing in any given market. In the circumstances there is no choice left for the present but to try to collect the usages only in so far as they are evidenced by judicial pronouncements. The aim of this book is to make such an attempt and a brief summary would explain the scheme adopted therein.

Chapter 1

The first chapter endeavours briefly to indicate the nature and incidents of customs and usages and to classify them. Though producers and consumers are separated by a large number of marketing and financial agents, and practices vary with different markets, yet a certain measure of coherence and uniformity is to be found running as a pattern in the net-work of the vast amount of commercial transactions which take place in this country. Thus, usages have been divided into two broad headings, namely, those which are universally recognised in the country, and a miscellaneous body of customs peculiar to particular trades. The main usages are the arhat system, the hundis, the Indian methods of contract in future and the Bahi Khata system. Allied subjects like broker and chamber of commerce have also

been discussed.

The nature, incidents and extent of the arhat system form the subject of discussion in the next chapter. This system has been in vogue for a very long time. The kachchi arhat system is an ancient institution in India. Pakki arhat is a recent importation. Pakki arhat is peculiar to India and combines a system as developed from the indigenous arhatia and the English *del credere* agent. The position of a pakka arhatia is partly that of an agent and partly that of a principal. There has been a great deal of controversy to isolate his character in the one or the other. The general view now seems to be that he is essentially an agent, but he deals as a principal with his own constituents and third parties as far as the performance of a contract is concerned. No exposition on the subject can be complete, unless the other rights and duties of an agent which apply to an arhatia are discussed and enumerated. Consequently, some of the ordinary provisions of the Contract Act about agency have been discussed to show how far they are applicable to him.

Chapter 2

The business conducted by a pakka arhatia is every day getting specialized. Forward transactions are becoming his accepted mode of business. Consequently the nature and incidents of contracts in future, such as speculation, Teji, Mandi or Teji-Mandi, have been discussed in the third chapter. At one time Teji-Mandi transactions were regarded as gambling, pure and simple; but now the view has taken an opposite turn. An attempt has, therefore, been made to show how even the courts, agreeing with the mercantile notions, are coming to regard such transactions as legitimate types of business. One peculiar feature of this kind of business is that it is clearly a copy of western methods. It exactly corresponds with the call and put transaction prevailing in Europe and for this reason the latter has been explained in this chapter. A comparison between these two also serves to illustrate how the western practices are being grafted on to the indigenous methods of commercial dealings. It, therefore, follows that the law which governs the subject in Europe must also more or less apply to the corresponding business prevailing in India.

Chapter 3

...

In the chain of middle men, next in importance to the arhatia, is the broker. The fourth chapter deals with the law relating to brokers. The arhatias as well as buyers and sellers always transact business through brokers. The disputes about the rights and duties of brokers have come up for discussion before the law courts from time to time, and therefore it might be useful to group together under a

Chapter 4

common heading the law on this subject which at present is to be found pretty widely scattered about. It is not without interest to note how the rights and duties of a broker differ from those of an arhatia.

Chapters 5 & 6

These are the two principal kinds of marketing agents who have been discussed in the two preceding chapters. In the business world the financing agents form a class by themselves. Sometimes the functions of marketing and financing agents are performed by the same person, but there are also business men whose only duty is to provide funds for trade and industry. Their own special methods and practices have also by the lapse of time crystallised into mercantile usages. The most outstanding feature of this system is the hundi. The advantages which cheques and bills of exchange enjoy in foreign countries are secured in India by the indigenous system of Hundis. Those people who deal in Hundis and act as financier to trade and industry are called sarrafs. Sarrafs have been known to India from very ancient times. They flourished long before the existence of Banks in India. Sarrafs were regarded as persons of great repute, and always commanded high respect in business circles. Hundis, therefore, are still regulated by the mercantile usages prevailing in the country. The custom is so fixed that even the wording of various types of Hundis has become conventional. Chapters V & VI deal with the various kinds of Hundis and the law relating to them. Although a Hundi is a kind of bill of exchange, and the Negotiable Instruments Act applies to it in general, there are some specific customs governing the Hundis to which the Act does not apply. These chapters are not meant to be commentary on the Negotiable Instruments Act. Only those provisions of this Act have been explained which apply to the Hundis. They have been supplemented by the law relating to the usages about them.

Chapter 7

All business men in India, whether shop-keepers, industrialists, arhatias, bankers or sarrafs follow the particular system of accounting called the Bahi Khata system. This is the subject of the seventh chapter. The Bahi Khata system must have had its origin in the dim antiquity of Indian civilisation, and long before the memory of man it had acquired a perfection approaching the modern accountancy. The system has been handed down from generation to generation without any further development. It is perfectly suitable today to meet the requirements of the present complicated form of business. All the advantages of the modern accountancy, including the double entry system, are

to be found in it. An attempt has been made in this chapter to explain the various kinds of Bahi Khata and to illustrate them by examples. It has also been shown how entries are posted from one kind of book to another. The different kinds of signs and notations used in the Bahi Khata have also been explained. The system of calculating interest which is supposed to be simpler than the western method has also been very briefly discussed.

In the eighth chapter the law relating to Bahi Khatas has been discussed as a necessary sequence. An attempt has been made to show the standard of accuracy and regularity which a Bahi Khata should attain in order to carry the requisite evidentiary value. It is only when the Bahi Khata stands the test of the law that it can be accepted by the courts. The law relating to various kinds of accounts and account books has been explained. In the discussion of the law of accountancy the importance and significance of mutual, open, and current account, settled account and account stated have also been reviewed.

Chapter 8

Another peculiar feature of the development of trade in India is the growth of the chambers of commerce. The rapidity with which chambers of commerce are springing up throughout the country is truly remarkable. They are now to be found not only in the larger cities but also in small commercial towns. This is due to the fact that commercial legislation in India is very inadequate and that it has been outpaced by the growth of the trade and industry. The chambers frame rules and regulations according to the existing business conventions and practices and these rules as a matter of fact become the four corners within which all business is conducted. It is high time that the legislature should direct its attention towards the development of commercial law which might be conducive to business and add to the convenience of traders. It would be both futile and impossible to attempt to compile a digest of the bye-laws of the various chambers. They vary from place to place in details if not in kind. Only a brief attempt has been made to show the importance of the chambers and the functions discharged by them. An especial attempt has been made to show how the advantages of the Arbitration Act are tried to be secured by private contracts even in those areas where the Government have been reluctant to apply the Act. The result is that a number of complicated questions of law have arisen and these have been discussed in the ninth chapter.

Chapter 9

The preceding chapters deal with those commercial matters which prevail universally throughout the country

Chapter 10

J. N. Singh
Advocate High Court
Jammu & Kashmir
Srinagar

more or less. There are also a very large number of usages governing particular trades. A complete collection of them can only be made by a commission of enquiry. The case law on this subject is not much. These usages are mostly accepted by business men and therefore cases regarding them do not very often crop up before the lower courts and even more rarely before the High Courts. Such judicial pronouncements as are to be found have been brought together and classified in the tenth chapter.

Appendix 1

The appendix I is devoted to an attempt to show how far trade usages have been recognised in particular trades in England.

Appendix 2

At the end a glossary of trade terms has been added in appendix II. Only such terms are included as have a special meaning or are of some commercial importance. Words which are generally understood have been excluded.

CHAPTER I

THE NATURE AND CLASSIFICATION OF CUSTOM AND USAGE.

Austin has defined custom "as a rule of conduct which the governed observed spontaneously and not in pursuance of a law set by a political superior."¹ The Privy Council² has defined custom "as a rule which in a particular family or in a particular district has from long usage obtained the force of law." In England a custom is a particular rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality.³ A rule of conduct, by uniform series of acts in pursuance of it, turns into a custom which people observe and follow without any coercion from anybody. The rule comes into existence without any apparent authority. Its birth and growth are natural sequence of the progress of human society. These rules of conduct may have been based on utility or may have risen from social and communal necessity, but they have always the express or tacit sanction of the collective will or common consent of the people among whom they prevail. Custom therefore may be defined as a rule of conduct uniformly governing a community from time immemorial.

Nature of custom

Custom differs from law in two respects. Firstly, that the law originates from the will or command of the sovereign power, whereas custom does not have its origin from any direct author. It comes into being and grows with the evolution of the community. Secondly, a law or statute once enacted can not be altered or repealed by any other power than that of a sovereign, whereas a custom may change, modify itself or be abandoned by a community without the intervention of any authority whatsoever.

Custom and law.

Law receives its sanction from the State, whereas in England the weight and authority of a custom depends upon its having been used since the "time whereof the memory of man runneth not to the contrary", but in India the binding force of custom lies in their secret antiquity and the reverential obedience to them by the people.

1. Austin's Jurisprudence Vol. I. p. 23.

2. Har Purshad vs. Sheo Dyal 3 I. A. 259 (1876).

3. Tanist Case (1608) Dav. Ir. 28 at page 31, 32.

Custom can not be created by an agreement among certain persons to adapt a peculiar rule so that it may be binding on others¹.

Custom and prescription.

They are analogous to each other in the fact that possession or user and time are inseparable incidents to both and the possession must in each case be long, continual and peaceful. They differ from each other in one important respect. Prescription is personal while custom is a long standing usage². Coke distinguishes between a prescription and custom in the following manner:—

“For the common law a prescription, which is personal, is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he had, or in bodies politic or corporate and their predecessors. A custom, which is local, is alleged in no person, but laid within some manor or other place.”

Farwell J³ said that the difference between custom and prescription was “only that the right of the former must be claimed by or in respect of a locality, and to the latter by a person or corporation”.

Essentials of a custom.

(1) IMMEMORIAL⁴.

The meaning of ancient has been defined as a time preceding the memory of man⁵. In England the time has been fixed as the year 1189, the commencement of the reign of Charles I⁶.

(2) CONTINUOUS⁷.

The custom must have been recognised continuously and without a break from time immemorial.

(3) PEACEFUL AND ACQUIESCED IN⁸.

1. Myina Boyce vs. Ootaram 8 M. L. A. 400; Charlotte Abraham vs. Francis—Abraham 9 Moore's L. A. 199; Bhaoni vs. Maharaja Singh 3 All 738.

2. Gopal Krishna Sil. vs. Abdul Samad Chowdhuri, 34 C. L. J. 319; 66 I. C. 640.

3. Mercer vs. Dannel (1904) 2 Ch. 534, 17 Dig. 6, 22.

4. Krishna Kumar Deb vs. Atul Chandra Ghosh A. I. R. 1924 Cal. 998; 39 C. L. J. 612; 84 I. C. 79, Mohammad Ibrahim vs. Sheik Ibrahim A. I. R. 1922 P. C. 59; 24 Bom. L. R. 944; 54 Mad. 308; 67 I. C. 115; Mt. Sona Bibi vs. H. H. Mir Abdul Husain Khan 16 I. C. 641; 42 Cal. 455; Maha Maya Devi vs. Haridas 27 I. C. 400, Mariam Bibee vs. Sheik Mohammad Ibrahim 48 I. C. 561; 28 C. L. J. 306; Kishun Singh vs. Govind Ram A. I. R. 1926 All. 215; 93 I. C. 363.

5. A. I. R. 1934 All. 37.

6. Chapman vs. Smith (1754) 2 Wes. Sen 506; 17 Dig. 10, 62.

7. Krishan Kumar Deb vs. Atul Chandra Ghosh 84 I. C. 79; Mst. Sona vs. H. H. Mir Abdul Husain 16 I. C. 641; Maha Maya Devi vs. Haridas 27 I. C. 400.

8. Kishori Lal vs. Jiwan Lal A. I. R. 1923 All. 242; 67 I. C. 231; Maha Maya Devi vs. Haridas 27 I. C. 400; Lala vs. Hira Singh 2 All. 49.

(4) REASONABLE¹.

Custom has been held to be reasonable on the ground that it confers a benefit on a large class of the community and does not unduly or unjustly restrict the rights of the public or individuals². In other cases an alleged custom has been held to be unreasonable on the ground that it would entail an unnecessary expense or throw an unjust or disproportionate burden on some for the sake of others.

(5) CERTAIN AND DEFINITE³.

It must be certain in its nature and definite within the limits of the area in which it is alleged to be in vogue.

(6) COMPULSORY⁴.(7) NOT IMMORAL⁵.

(8) CONSISTENT WITH OTHER CUSTOMS.

It is not necessary to prove that a trade custom is either ancient or continuous. A trade usage may still be in course of growth. It may require evidence in each case for its support, but in the result it is enough if it appears to be so well known and acquiesced in, that it may reasonably be presumed to have been an ingredient tacitly imported by the parties into their contract.⁶ Trade custom must be notorious, uniform, reasonable and certain.⁷

Mere statement that a custom exists is not enough. All the incidents of the custom must be pleaded and proved⁸. A party pleading custom cannot be allowed to prove it in a narrower sense than that stated in the pleadings.⁹ Party relying on custom must allege it with distinctness and certainty, but should not be pinned down to

Trade custom

Pleading of custom.

1. Raje Dattaji vs. Puran Mal A. I. R. 1927 Nag. 89 : 98 I. C. 759, 16 I. C. 641, 27 I. C. 400; Maung Piwe Vs. Maung Chan 120 I.C. 658; Bajrangi vs. Lala Janki Parshad 1936 Pat. 637.

2. Simpson vs. Bithwood (1691) 3 Lev. 307, Tison vs. Smith (1838) 9 Ad. & El. 406.

3. Mannathi. Krishnan vs. Siva Ram Krishna A. I. R. 1927 Mad. 73 : 24 M. L. W. 691: 98 I. C. 619; Krishna Kumar Deb vs. Atul Chandra Ghosh A. I. R. 1924 Cal. 998; Mahamaya Devi vs. Haridas 27 I. C. 400.

4. Kandhdeo vs. Dewa Singh 36 I. C. 954; Maung Pwe vs. Maung Chan A. I. R. 1929 Rang. 300: 7 Rang. 487: 120 I. C. 658.

5. Mohidin vs. Shivlingappa 1 Bom. L.R. .170 : 23 Bom. 666; Gokal Chand vs. Mst. Romalu 39 P. L. R. J & K. 39.

6. Jagmohan Ghosh vs. Manik Chand (1859) 7 M. I. A. 263; Panna Lal vs. Har Gopal 1 Lah. p. 80 : 55 I. C. 931.

7. Price vs. Browne 14 Mad. 420 : 1 M. L. J. 540.

8. Badruddin vs. Tej Ram A. I. R. 1929 All. 233 : 1929 A. L. J. 380 : 116 I. C. 300.

9. Thakur Rudra Pratap vs. Thakur Nirman Prasad A. I. R. 1933 Oudh 61: 74 I. C. 225.

Advocate High Court

Jammu & Kashmir

Srinagar.

precise forms of the pleadings.¹ A custom is not bad because it has been inaccurately defined by the parties in their pleadings.²

Proof of custom.

The evidence required to prove a custom may be divided into three heads:—

1. INSTANCES OF CUSTOM RECORDED IN DOCUMENTS.

Such documents can be used as admission of a party or under section 32 of the Indian Evidence Act if the person making thereof can not be found.

2. ORAL EVIDENCE.

Custom must be proved by clear and cogent evidence. The quantum of evidence to prove a custom varies with every case. No hard and fast rule can be laid down.³ Evidence of a single witness is not sufficient to prove a recognised or enforceable custom.⁴ Oral evidence of those people who are governed by the custom is more affective to prove that particular custom.⁵ Custom must be proved by numerous instances. One or even four modern instances are insufficient to prove it.⁶ Oral evidence should not be led to prove a broader custom than that set up by the party.⁷ Evidence afforded by instances is far more satisfactory than evidence by tradition, but it is beyond question that an ancient custom can be established even by the versions heard from persons who had special means of knowledge.⁸

3. RECOGNITION OF CUSTOM IN JUDICIAL PRONOUNCEMENTS.

Judgment recognising the validity of a custom in a particular locality is a good piece of evidence to prove an instance of custom. Where the custom has been recognised in a large number of cases, it is sufficient to dispense with proof in each individual case.⁹

1. Viswanatha Swami vs. Kamulu Ammal 30 M. L. J. 451; 19 M. L. T. 296; 31 I. C. 833.

2. Mohidin vs. Shivlingappa 1 Bom. L. R. 170; 23 Bom. 666.

3. Raghubhushan vs. Vidia Varidhi 34 I. C. 875.

4. G. Narayan Swami vs. Balijepalli 2 L. W. 194; 27 I. C. 937; Ramdat vs. Mt. Sukhia 25 I. C. 869; Manikya vs. Faizuddi 22 I. C. 943; Bulchand vs. Lekhu 12 I. C. 435.

5. Ram Lal vs. Gopi 196 P. L. R. 1914; 24 P. R. 1914; 25 I. C. 710.

6. Rampal Singh vs. Bajrang Singh A. I. R. 1926 Oudh 211; 1 Luck. 50; 92 I. C. 126; 3 O. W. N. 73; 13 O. L. J. 404.

7. Nathuni Rai vs. Sir Rameshar Singh Bahadur A. I. R. 1924 Pat. 147.

8. Raghunath Dass vs. Ganesh Dass 138 I. C. 406; 1932 A. L. J. 615; A. I. R. 1932 All. 603.

9. Sir Raja Rama Rao vs. Raja of Pittapur 41 Mad. 778; 16 A. L. J. 833; 45 I. A. 148; 47 I. C. 354; Girish chandra vs. Ravindra Nath Dass 61 Cal. 659; 156 I. C. 512; A. I. R. 1935 Cal. 17; Benarsi Dass vs. Sumat Prasad 164 I. C. 1047; 1936 A. L. J. 1237; A. I. R. 1936 All. 641; Kumhambi vs. Kalanthar 27 M. L. J. 157.

Where a valid custom is proved it supersedes the general law.¹ Where a codified law contains a saving clause about custom and no provision is contained regulating the custom, the court should give effect to the custom validly proved.² Customs may develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.³

Effect of custom.

Usage.

A usage may be defined as a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life.⁴ It is a particular course of dealing or line of conduct which has acquired such notoriety that when persons enter into contractual relationship in matters respecting the particular branch of business life where usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary.⁵

Definition of usage.

A usage should be notorious, certain, reasonable and must not be against any established law.⁶ It is not necessary that usage should be ancient.⁷

Characteristics of usage.

1. NOTORIETY.

A usage must be so notorious and well known in any branch of trade or commerce that any person who enters into a contract in that branch of business should be deemed to have presumed that the usage was to be a part of the contract.⁸

2. CERTAINTY.

A usage must be certain as to form part of a contract.⁹

1. *Ohhatradhari Singh vs. Saraswati Kumari* 22 Cal. 156; *Karamatali vs. Saat Ali* 9 O. W. N. 1104; A. I. R. 1933 Oudh 4 (F. B.): 141 I. C. 27: 8 Luck. 228.

2. *Tuni Orain vs. Leda Oraon* 1 Pat. L. J. 225: 20 C. W. N. 1082.

3. *Henrietta Muir vs. Attorney General of Canada* A. I. R. 1930 P. C. 120: 58 Mad. L. J. 300: 126 I. C. 88.

4. *Hutten vs. Waren* (1836) 1 M. & W. 466 at page 476, 17 Dig. 40; *North Western Rubber Co. Ltd. vs. Hutten Bach & Co.* (1908) 2 K. B. 1907. 17 Dig. 46.

5. *Moult vs. Halliday* (1898) 1 K. B. 125, 17 Dig. 20.

6. *Nelson vs. Dahl* (1879) 12 Ch. D. 568, 17 Dig. 68, 710, *Strathlorne Steamship Co. Ltd. vs. Baird (Hugh) & Sons. Ltd.* 1916 S. C. (H. L.) 134, 41 Dig. 607.

7. *Hashwood vs. Magniac* (1891) 3 Ch. 306, 17 Dig. 7; *Raja Sati Prasad Garg vs. Mamatha Kathkar* 6 I. C. 291.

8. *R. vs. Strok-upon-trent inhabitants* (1843) 5 Q. B. 303, 17 Dig. 55, *Corbin vs. Stewart* (1911) 28 T. L. R. 99, 34 Dig. 552.

9. *Nelson vs. Dahl* (1879) 12 Ch. D. 568, *Sagar vs. Ridehalgh and Sons. Ltd.* (1931) 1 Ch. 310 C. A.

3. REASONABLENESS.

A usage must be reasonable.¹ No one who is ignorant of a usage can be bound by it nor can he be assumed to have acquiesced even in a reasonable usage.²

4. LEGALITY.

No usage, however, extensive can be allowed to prevail against a positive law.³

Difference between a custom and a usage.

A usage differs from a custom in the sense that it need not be ancient.⁴ A usage is not a synonym for custom. It denotes what is done by people uniformly and consistently. It is also used to denote what is done uniformly in a certain locality or by a certain trade for a period sufficient to make it probable that people adopt it as an implied term. A usage will obtain the force of law only when it is reasonable, invariable and ancient in which case it becomes custom. Where it is proved that an ancient custom could not have come into existence, the usage fails to possess any legal effect.⁵ There is a great difference between a custom and a usage and the latter may be established in a much less period of time than a custom.⁶ A usage is limited to a class or a confined area and it may be excluded from a contract by an express stipulation.⁷

Usage and contract

Usage is useful in a contract in two senses. Firstly, that contracts may be entered into subject to the usage. Where the usage is well established and parties do not want to express in writing the whole of the contract by which they intend to be bound, the contract may be made subject to prevailing usage.⁸ Secondly, usage may be proved to explain terms of a contract. In mercantile contracts terms are used which have a peculiar meaning to the merchants. The full import of the contract can be proved by showing what was the exact connotation of a particular word according to a commercial usage prevailing in the locality. Words

1. *Tucker vs. Luiger* (1883) 8 A. C. 508, 2 Dig. 12, 49; *Gibbon vs. Pease* (1905) 1 K. B. 810 C. A., 7 Dig. 436, 471; *Devenold vs. Rosser & Sons.* (1906) 2 K. B. 728, C. A.

2. *Scott vs. Irwin* (1830) 1 B. & Ad. 605, 17, Dig. 29, 309.

3. *Goodwin vs. Roberts* 1875 L. R. 10. Exch. 337, 17 Dig. 7, 31; *Neilson vs. James* (1882) 9 Q. B. D 546.

4. *Gopal vs. Collector of Aligarh* A. I. R. 1927 All. 232.

5. *Thakur Rudra Pratap vs. Thakur Nirman Prasad* A. I. R. 1923 Oudh 61 : 9 O. L. J. 552 : 74 I. C. 225.

6. *Eadward Dalglish vs. Sheikh Gazaffar Hossein* 3 C. W. N. 21.

7. *Branda Steamship Co. vs. Green* (1900) 1. Q. B. 518 C. A., 17 Dig. 54, 588; *Aktieselskab Helios vs. Ekman & Co.* (1897) 2 Q. B. 83, 17 Dig. 48, 537; *Meek vs. Court of London Authority* (1918) 2 Ch. 96, C. A., 34 Dig. 87, 646.

8. *Gibson vs. Small* (1853) 2 H. L. Cas. 353 at 397, 17 Dig. 42, 462.

though apparently unambiguous and having an ordinary meaning are sometimes used by contracting parties in a different sense.¹

A usage is proved by the oral evidence of persons who become cognizant of its existence by reason of their occupation, trade or position.² A commercial usage may so often be proved in a court of law that courts will take judicial notice of it.³ As regards necessity of proof usage passes to various stages. In primary stage usage should be proved with certainty and precision, in secondary stage when courts have become slightly familiar with usage, slight evidence is required to establish it and finally when it becomes very well known courts take judicial notice of it and no evidence is required.

Proof of usage.

Classification of customs and usages.

The industries in India may broadly be divided into three main classes, namely agriculture, cottage industries and big industrial concerns like mills etc. Industrial condition in India has its own peculiar features. The producer is far away from the consumer and the contact between them is brought about by a chain of middle men. For reasons of poverty and ignorance the producer has to rely upon financing and marketing agents for the supply of the cost of production and for the sale of his produce. It is round about these middle agencies that a horde of usages have developed. The relationship between the producer and the middle man on one side and that of consumer and the middle man on the other is regulated partly by statutes and partly by usages and customs recognised by them. The mills and other industrial concerns of big magnitude are governed by legal enactments. It is in agriculture and the cottage industries that the usages play an important roll. It is of interest to trace the chain of middle men both in agriculture and the small scale industries.

Chain of Middle-men.

The marketing agents mostly combine in themselves the functions of marketing and finance. In villages where the market is an unorganised one, the contract between the dealer and the middle man purchaser is made by sheer process of bargaining. Of course, the cost of production, the marketing knowledge of the producer, his need of

Marketing agencies.

1. Produce Brokers Co. Ltd. vs. Olimpia Oil & K. Co. (1917) 1 K. B. 320, 17 Dig. 43, 488.

2. Remathews, Exparte Powell (1875) 1 Ch. D. 501 C. A., 22 Dig. 67, 394.

3. Retorance, Exparte John Marstons Carriage Works Ltd. (1924) 2 I. R. 1, Digest supplement.

money and other attending circumstances determine the point at which the bargain is struck.

Vyopari

The first marketing agent in the village is the vyopari or village Bania. When the grain is stored in a heap, the vyopari after examining the heap and the inevitable bargaining settles the price with the farmer. He is assisted by the village Taula (village weighman) whose business is to know the quality and quantity of grain that every cultivator has to sell. The vyopari generally pays the full price to the farmer but sometimes only a part payment is made and the rest is paid later on. He takes all the risk of trade upon himself. His profit depends upon the fluctuation of prices and the economies which the cultivator dealing in small quantities cannot secure. By the intervention of the vyopari the cultivator avoids the trouble and risk of marketing.

The village Bania does not always start his transaction when the crop is thrashed and stored. He very often makes an advance even before the crop is ripe and thus the crop is almost hypothecated and it is at the disposal of the vyopari.

Species of vyopari.

There are vyoparies dealing in special kinds of crops only. In sugar-cane growing areas *khandsali* system is prevalent. It is an advance by the village Bania long before the sugar-cane crop is ripe on the stipulation that the sugar cane juice will be sold to him at a stipulated forward rate which is generally lower than the market rate at the time when the crop ripens. The cost of crushing is borne by the cultivator. The vyopari charges no interest on the loan for the loan is to be repaid in kind.

The same system of advance is followed in cotton areas for cotton crops. In Kanauj, Delhi, Ahmedabad, Jaunpur and Ghazipur advances are made by perfume-dealers on crops of flowers. The same is the practice in Etawah about Ghee.

Arhatia.

The vyopari links the village market with the bigger mandis where the wholesale dealers are called arhatias. The arhatias are of two kinds, kachcha and pakka. The kachcha arhatia acts as a commission agent for all sellers in the countryside including cultivators and village Banias. The pakka arhatia is a wholesale dealer holding orders of big firms and makes his purchases from the kachcha arhatia. In big Mandis he is the primary distributor of the agricultural produce, and so stands at the apex of the structure of Indian marketing with the kachcha arhatia, the dealer

in a small Mandi in the middle and the village Bania at its base. The arhatia finances the dealers below him and he in his own turn wants financial facilities (a) to make advances to the vyopari to pay for the produce (b) to arrange its storage till it is sold or his client takes away the goods and (c) for the movement of the produce from the Mandi to the port town, millyard or other places where the goods are required. He generally takes advances from Sarrafs on Hundis or loans from the Banks.

There are various types of middle men in urban industries. The artisans mostly work at their houses and the raw material to them is supplied by an itinerant dealer who is the first of these types of middle men. The most familiar instance is the trader who supplies yarn to the weaver in his cottage, gives him piece wages and deducts his commission when he takes over the finished produce. In blanket weaving the dealer supplies ready spun yarn to the *kamalia* and collects from him the finished goods. In carpet weaving the dealer usually makes cash advance to the weaver and afterwards takes over the finished product. Similar is the practice in needle work and embroidery industries as well as the chicken and the gold and silver thread work industries of Lucknow and Benares.

Cottage industries marketing

Sometimes the middle man is himself an artisan who has grown rich and has employed his fellow artisans in his own establishment. In Benares, for instance, the *Karkhanadar* weaver supplies the artisans with the raw materials, gold and silver threads, yarns and dyes and even with the looms when they work in the *karkhana*. Similarly in metal industry of Moradabad and Mirzapur *karkhanadar* supplies the metal sheets and implements to the artisans to work in his workshop. In *zardozi kamdani* and *chicken* industries of Lucknow *karkhanadari* system is well established. The *chicken* workers partly work in the *karkhana* and partly at their houses. In Agra there are *karkhanas* for making shoes, carpet and stone ware.

Karkhanadars.

The large scale dealer acts both as financing and co-ordinating agent. He supplies the necessary funds and raw materials and sees the process of manufacture from stage to stage keeping the finished product to himself which he finally disposes of to the consumers.

Large scale dealer.

The *sahukars* are the first of the various classes of money lenders who supply funds to the cultivators in villages and artisans in urban areas. They advance loans on bonds, *kistbandi* system (instalment bonds) and pawns.

Financing agencies
Sahukars

S. N. Das
Advocate High Court
Jammu & Kashmir

Sarraf

Next higher in stage are the sarrafs who make advances of higher orders including big loans. They deal in simple debts, loans on mortgage securities and advances against storage of goods. The sarrafs are divided into small sarrafs and *kothiwal*. The *kothiwal* sarrafs are big bankers of established repute and deal as private bankers at their own houses.

Banking agencies.

These include Co-operative bank, Joint stock bank, Exchange bank and Imperial Bank.

From the examination of these marketing and financing agents it appears that the marketing or the credit system in the villages is very simple and is mostly regulated by the Contract Act and the Negotiable Instruments Act. There are, however, a few fixed usages, for instance, rearing of cattle on *batai* and *tikurbatai* system and similarly cultivation on *batai* system, advance in seed grain on *sawai* and *deorha* system, the practice of *Tulai* (weighment) charges and the like.

The more involved is the position of the arhatia or the sarraf. It is the position of these middle men that needs enquiry. The arhat and sarrafi systems have been prevalent in India for centuries. The Contract Act deals only with ordinary agents. It does not have within its purview the position of a kachcha and pakka arhatia. Therefore among the marketing agents arhat system needs discussion. Of the financing agents, the sarraf mostly deals in hundis which are not covered by the Indian Negotiable Instrument Act. The other forms of credit on bonds, pronotes, mortgages and pawns are regulated by the Contract Act, the Transfer of Property Act and the Negotiable Instrument Act. Therefore, the hundis provide the next class of important usages of general importance. Both the arhatias and the sarrafs have their own peculiar ways of accounting which is called *bahi khata* system. It is a time honoured system in India. It differs from the English system of book keeping. It has its own symbols and notations and its own conventions. Another class of business prevalent in India is dealing in forward contracts. Although it is a copy of the western system but the speculators in India have in many respects made it their own and a certain amount of case law has sprung about it. The other minor usages rarely come before the courts and consequently the case-law relating to usages of particular trades is not much. It is, therefore, convenient to divide the usages into (a) universal, consisting of arhat system, hundis, *bahi khata*, and dealings in future and (b) miscellaneous usages of particular trades.

CHAPTER II

ARHATIA.

The custom of arhatia exists in India for a very long time. In English terminology they are called commission agents. The word "arhatia" seems to have been derived from the Hindustani word "arh" meaning screen. The screen stands as protection between two parties and also hides the view of the one from the other. The position of the arhatia is somewhat the same. He is a sort of middle man between the buyer and the seller. Arhatias are of two kinds—pakka and kachcha. The usage of pakka arhatia is of more recent growth than that of kachcha arhatia.

Meaning of
arhatia.

It is difficult to give a complete and concise definition of a pakka arhatia. Macloud, J.,¹ had defined him as "A person who enters into a contract of employment with his constituent for reward. He obtains instructions from his client what contracts to enter into but generally speaking the constituent is not concerned with the method in which his instructions are carried out." Beaman, J.,² described him as follow:—

Pakka arbatia.

"A pakka arhatia, a creation of legal entity as far as I know of the Bombay High Court, is a commission agent and something more. He receives orders from his constituents and places them in the open market. His obligations are briefly to find money for goods and goods for money and settle differences on due date. His peculiar feature, and one which is, as far as I know, not shared by any other agent known to the law, is that he can allocate his principal's contract to himself when it suits him to do so. Neglecting this one distinguishing characteristic he is very like an ordinary *del credere* agent. But he is that and something more."

Both these definitions give only a partial view of pakka arhatia and the observation of Beaman, J., that he is a legal entity, with due respect to him, does not seem to be correct. Pakka arhatia is known in business circle for centuries. His position was fully understood and accepted by business men long before any attempt was made to discuss the position of a pakka arhatia in a court of law. Therefore the best thing is to try to give the conception and incidents of pakki arhat system and not to attempt at a complete definition.

1. Bhagwan Dass Paras Ram vs. Burjorji Ratanji (1912) 14 Bom. L. R. 807; 37 Bom. 347.

2. Bhagwan Das vs. Burjorji (1913) 15 Bom. L. R. 85, 97.

Conception of a
Pakka arhatia.

There has been a lot of difference about the conception of the legal status of a pakka arhatia. Some courts are inclined to think that he stands in the position of buyer and seller in relation to his constituent. Others hold that he is an agent of his principal with certain special rights, while there are also authorities to the effect that he is both an agent and a principal, that is, he is agent to a certain extent and after that he becomes a principal. It is interesting to lay down the views of the various High Courts on the subject.

The earliest case¹ is of 1904 in which Chandvarkar, J., described the incidents of a pakka arhatia in details as follows:—

“(1) A Pakka adatia can allocate an up-country constituent's order to himself, without the knowledge, consent, or permission of the constituent. This may be called the right of allocation in the first instance.

(2) A pakka adatia receives an order to buy or sell. Accordingly he enters into a contract with a Bombay merchant. Subsequently but before the due date, the pakka adatia enters into a cross contract with the same merchant on his own (the pakka adatia's) account and either squares the original contract or keeps the two contracts open till due date. He is entitled to do that and yet keep the order of the first constituent open till the due date so as to hold the said constituent bound on that date to deliver or take delivery as the case may be.

(3) In the case put in above (No. 2) instead of entering into the cross contract on his own account, the pakka adatia can enter into it on behalf of another constituent. The same result follows.

When a pakka adatia receives a second order from his constituent to enter into a cross contract and cover his first order against due date, the pakka adatia is not bound to carry out the second order in case owing to loss of credit he is unable to do so and all that he is bound to do is to inform the constituent accordingly so as to enable the latter to put through his order through some other pakka adatia.”

This case went in appeal² before Sir Lawrence Jenkins who described the incidents thus:—

“(1) The pakka adatia has no authority to pledge the credit of the up-country constituent to the Bombay merchant, and no contractual privity is established between the up-country constituent and the Bombay merchant.

(2) The up-country constituent has no indefeasible right to the contract (if any) made by the pakka adatia on receipt of the order, but the pakka adatia may enter into cross contracts with the

1. Kanji Deoji vs. Bhagwan Das Narotam Das (1905) 7 Bom. L. R. 57, 65, 71.

2. Bhagwan Das Narotam Das vs. Kanji Deoji (1905) 7 Bom. L. R. 611, 616 : 30 Bom. 205, 216.

Bombay merchant either on his own account, or on account of another constituent, and thereby for practical purposes cancel the same.

(3) 'The pakka adatia is under no obligation to substitute a fresh contract to meet the order of his first constituent.'

In this case the position given to a pakka arhatia was that of an agent modified by certain privileges given to him by the usage in Bombay for the protection of the up-country constituent as well as his ownself. These privileges are analogous to that of a principal party to the contract, but it should not be supposed that thereby the agent loses his position as such or that there is any conflict between his position as an agent and that of a principal. His Lordship said, "There was nothing unreasonable or unjust in the custom alleged and that on the other hand it appeared to him to be a usage intended for the convenience of up-country constituents and had been treated uniformly, as the evidence showed, as tending to the convenience and benefit of all parties concerned, that no one had until then complained of it and that but for it up-country constituents would be at a serious disadvantage in having to deal with Bombay merchants whom they do not know and whose names and contracts they never care to inquire about." The same view was held by Davar, J., in *Harmukh Rai Vs. Narotam Dass*¹ in which the pakka arhatia was put in the position of an agent with modifications specified in the above case. In the next case of *Kedar Mal Vs. Suraj Mal*² Chandravarkar, J., maintained the same view, but he seems to have undergone a change in *Burjorji Vs. Bhagwandass*.³ He along with Scott, C. J., held that the relationship between a pakka arhatia and his constituent is that of vendor and purchaser. Batchelor, J., who was a party to the decision *Kedar Mal Vs. Suraj Mal*⁴ and had held that the relationship between pakka arhatia and his constituent was that of a principal and agent, also seems to have changed his view in holding with Scott, C. J., that the relationship was that of buyer and seller. It is in this case that the view seems to have taken a turn. In the same year Macleod, J., also held in *Chhog Mal Vs. Jainarain*⁵ that there was no privity between the opposite contracting parties and as between the pakka arhatia and the constituent the business was finished

1. (1907) 9 Bom. L. R. 125.

2. (1908) 10 Bom. L. R. 1230 : 33 Bom. 364 : 3 I. C. 441.

3. (1913) 15 Bom. L. R. 716 : 20 I. C. 834.

4. (1908) 10 Bom. L. R. 1230 : 33 Bom. 364.

5. (1913) 15 Bom. L. R. 750, 758, 759 : 20 I. C. 882.

when an order for purchase or sale was accepted. Whether the arhatia took the risk himself or covered himself by selling again was entirely within his discretion. The learned Judge cited *Burjorji Vs. Bhagwandas*¹ and followed the view held therein. Beaman, J., too seems to be inclined to this view in *Abraham Vs. Sarup Chand*² wherein the position of a pakka arhatia was distinguished from that of a kachcha arhatia and it was held that although the pakka arhatia was in name an agent he was for all purposes in the position of a principal, as he guaranteed the performance of the contract. The next important case in which the subject was elaborately discussed was *Manna Lal Vs. Radha Kishan*.³ Macleod, C. J., and Fawcett, J., concurrently held that the relationship between the constituent and his pakka arhatia was that of vendor and purchaser. The reason given was that once a constituent places an order with a pakka arhatia, the contract is complete if accepted by him. The constituent is not concerned how the order is to be carried out; whether the pakka arhatia takes the risk of the performance of the contract upon himself or enters into a covering contract with some other party. If a covering contract is entered into there is no privity of contract between the constituent and other party. There is then an absolutely distinct dividing line between the dealings as between the arhatia and his constituent on the one hand and his covering dealings, if any, on the other. The parties to either of these contracts are always principals. In 1926, however, the Bombay High Court decided in a case⁴ that the pakka arhatia is entitled to demand margin money if the rise and fall in the market justifies the demand. This is the right of an agent and in this case the pakka arhatia was given the position of an agent. In 1928 the Bombay High Court⁵ following the view laid down by the Allahabad High Court in *Tika Ram Vs. Daulat Ram*⁶ held that the relationship was that of principal and agent although it should be noted that that case was not a pakki arhat case but was an ordinary commission

1. (1913) 15 Bom. L. R. 716 : 20 I. C. 834.

2. Suit No. 542 of 1916 unreported judgment dated 23-11-16 of the Bombay High Court.

3. (1920) 22 Bom. L. R. 1018 : 45 Bom. 386, 410—412.

4. *Devshi Harpal vs. Bhikam Chand* (1927) 29 Bom. L. R. 147 : 100 I. C. 619.

5. *Nand Lal Panna Lal vs. Kishan Chand Chatur Bhuj* (1928) 30 Bom L. R. 1391 : A. I. R. 1928 Bom. 548 : 112 I. C. 734.

6. (1924) 46 All. 465 : 22 A. L. J. 591.

agency transaction. The same view was held in 1929.¹ In the same year this view was endorsed² by Wadia, J., which was also a case of ordinary commission agency. In 1931 the right to demand margin money again came up for discussion and the pakka arhatia having been put in the position of an agent was held³ entitled to call for margin money. Thus the Bombay High Court has taken different views at different times. The Nagpur Court in Harnarain Vs. Radha Kishan⁴ held that the position of a pakka arhatia in relationship to his constituent is not that of principal and agent but of principal and principal. The same view was held by the Privy Council in Balthazar & Son. Vs. E. M. Abowath⁵ wherein he was assigned the position of a principal in spite of the fact that the word "commission agent" was used in the contract. This case, however, was decided on the peculiar terms of the contract entered into by the parties. Therefore it can not be said that this dictum has any application to the case of a pakka arhatia.

The Allahabad High Court is consistently inclined to the view that the relationship between the pakka arhatia and his constituent is that of principal and agent. This was the view held by Walsh, A. C. J., and Neave, J., in Tika Ram Vs. Daulat Ram.⁶ Discussing the position their Lordships remarked, "The defendant works as a commission agent, what is known as pakka arhatia, probably corresponding to what is known in England as *del credere* agent, that is to say, an agent or factor who, being entrusted with the goods of his principal to dispose of to the best advantage, is in lawful possession of them with a general power to deal with them without reference to his principal, but guaranteeing the solvency of the sub-purchasers, and while entitled also to an indemnity from his principal against all losses resulting from carrying out his duty, is under an obligation to pay to the plaintiff, his principal, the amount due after the accounts have been properly settled." The same view was taken in Champa Ram Vs. Tulshi Ram⁷ by Iqbal Ahmad and Sen, JJ., that "the position of a pakka

1. Harakh Chand vs. Somati Lal (1931) 33 Bom. L. R. 1200 : A. I. R. 1932 Bom. 25.

2. Mohd. Haji Hamid vs. Jute & Gunny Brokers Ltd. (1931) 33 Bom. L. R. 1364 : A. I. R. 1932 Bom. 42.

3. Saker Bhai vs. Ramnik Lal (1932) 34 Bom. L. R. 709 A. I. R. 1932 Bom. 328

4. A. I. R. 1923 Nagpur 324, 326 : 75 I. C. 906.

5. (1927) 5 Rangoon 1 P. C.

6. (1924) 46 All. 465 : 22 A. L. J. 591 A. I. R. 1924 All. 530

7. (1927) 26 A. L. J. 81 A. I. R. 1927 All. 617 : 105 I. C. 739

arhatia is analogous to that of a *del credere* agent who incurs only a secondary liability towards his principal." The legal position of the pakka arhatia was held partly that of an insurer and partly that of a surety for the parties with whom he deals to the extent of any default by reason of any insolvency or something equivalent. His liability, however, did not go to the extent of making him liable to the principal where there could be no profits by reason of stringency in the market or something equivalent but not by reason of any neglect on the part of the pakka arhatia. The basis of relationship was held to be essentially that of an agent and principal. With due respect, it is hard to understand how he stands in the position of a surety. His liability is not secondary. The principal looks to the pakka arhatia as the principal party who is liable for the performance of the contract. In case where the arhatia does not enter into any covering contract with the third party it cannot be said that he is the surety for anybody. In other respects these decisions accurately describe the position of a pakka arhatia. The correct position of a pakka arhatia is given in *Megh Raj Vs. Anup Singh*¹ wherein their Lordships have held that he is an agent and at the same time is liable both to the purchaser and seller for the performance of the contract as a principal.

The Lahore High Court has taken the same view. Sir Shadi Lal, C. J., and Walker, J., in *Permeshari Das Vs. Raghubar Dass*² held that a commission agent doing business on pakki arhat system is bound to carry out the instructions of his constituent and if he fails to purchase or sell the commodity in the market he is personally liable for the performance of the contract. In *Jotram Shersingh Vs. Jiwan Ram Sheoli Mal*³ the status of a pakka arhatia was described as follows:—

"The pakka arhatia stands on a different footing from that of an ordinary commission agent. The relationship between the parties is that of principal and agent and the Pakka Arhatias are liable to render accounts, though the constituents are not concerned with any party except the Pakka Arhatias and can look to them alone for the fulfilment of the contracts and consequently no question of actual transaction with third parties arises in these cases."

The last case⁴ was decided in 1933 wherein pakka

1. A. I. R. 1935 All. 1004; 1936 A. L. J. 475.

2. (1931) 32 Pnn. L. R. 380.

3. A. I. R. 1932 Lahore 633.

4. Har Prasad Tulsī Ram vs. Jindar Prasad Naim Kunwar; (1933) 15 Lah. 496; A. I. R. 1934 Lah. 191; 150 I. C. 109 contra B. C. G. A. Punjab Ltd., vs. Bharat Krishna Trading Co. A. I. R. 1938 Lahore 253 where pakka arhatia was treated as principal.

arhatia was held to be an agent by the contract as well as personally liable for the price of goods bought on behalf of his principal. He was given a dual character of agent and principal. It is submitted that this decision accurately describes the position of a pakka arhatia. Therefore we see that the opinion has been very much divided about the legal status of a pakka arhatia. The reason is that attempt has always been made to limit the conception of a pakka arhatia within some accepted legal terminology. Some courts have emphasised more his position as an agent while others have gone so far as to treat him as a pure buyer or seller. There has been a middle view that he is an agent with a guarantee for the third party. The real position is that pakka arhatia is a creation of usage peculiarly suited to the conditions of India. He occupies the position of an agent and at the same time possessing certain elements of a principal. He is essentially an agent for the following reasons:—

1. The very word arhatia denotes agency *i. e.* he who carries on commission agency business. The constituent orders him to purchase or sell a certain commodity. He never makes any enquiry as to whether the arhatia is willing to purchase or sell a certain amount of goods. Therefore in popular conception he is never regarded as buyer or seller but as one who is to carry on the orders of his constituent.

2. His two important rights, to call for margin money and to charge commission and brokerage clearly go to show that these are the rights of an agent and that he is an agent.

3. His two important duties are to carry out the order of the constituent and to render account of the same. The arhatia cannot refuse to carry out the orders of his constituent. If he does so he exposes himself to the risk of an action for damages. The constituent is always entitled to call for accounts of the transaction from the arhatia. Thus the duties of an arhatia are also that of an agent.

4. When a constituent places an order with the arhatia and the arhatia accepts it, it is not to purchase or sell the commodity at a fixed rate as would be the case for a buyer or a seller but it is to purchase or sell the commodity at the current market price. In other words the arhatia undertakes to carry out the orders of his master according to the current conditions of the market. This is purely an attitude of agency. Thus in all essential elements the

Advocate High Court

Jammu & Kashmir

Srinagar,

pakka arhatia resembles an agent.

There is only one aspect in which he can be regarded as a principal. It is that he undertakes upon himself the performance of the contract. In India when an up-country merchant places an order in Bombay, Calcutta or Amritsar it is not possible for him to find out the financial position of the party with whom the contract is likely to be completed but the arhatia possesses full knowledge of these conditions. Moreover, the market is subject to such violent fluctuations and some times so hurriedly that no time is left for any communication between the arhatia and the constituent. Therefore it is best and safest for the constituent that the arhatia should be held responsible for the performance of the contract. Once he assumes this responsibility it is immaterial whether he places his constituent's order in the open market or himself undertakes to carry out the contract. All that the constituent is concerned with is that the arhatia should find money for goods and goods for money or in their absence to settle the contract on the due date by payment in the difference of prices. It is to suit the Indian conditions that the pakka arhatia has been invested with this responsibility and the corresponding rights. This aspect of the pakka arhatia has led the courts to think that he is a simple buyer or seller. The real fact is that he is not a buyer or a seller. In all aspects while keeping his position as an agent he is responsible to his constituent for the performance of the contract. Thus he occupies the dual position of an agent and a principal. In *Kanji Vs. Bhagwan Das*¹ it was held that there was nothing unreasonable or unjust in this dual capacity of a pakka arhatia. It was a well established usage and should be accepted by the courts of law. It is strange to find that where so many doubts have cropped up in courts in business circle the incidents of a pakka arhatia are well understood and nobody ever cares to question them. From the authorities cited above it is possible to lay down the incidents of a pakka arhatia which will give a fair idea about the position which he occupies in the market.

Incidents of
pakka arhatia.

1. As far as the performance of the contract is concerned the relationship between the constituent and the pakka arhatia is that of principal and principal while in other respects the pakka arhatia is an agent.

1. (1905) 7 Bom. L. R. 57, 69, 70.

2. There is no privity of contract between the constituent and the merchant with whom the pakka arhatia enters into contract in obedience to his constituent's orders. Therefore the constituent is not concerned whether the pakka arhatia finds an actual buyer or seller in accordance with the orders of his constituent or himself accepts his constituent's order and appropriates the contract to himself. The contract between the constituent and the pakka arhatia is complete as soon as the pakka arhatia accepts the order of his constituent.

3. Both the constituent and the merchant with whom the pakka arhatia enters into a covering contract must look forward to the arhatia for the performance of the contract and they cannot sue each other. The pakka arhatia is a party to the contract and he must, on the due date, find goods for money and money for goods for his constituent or settle the difference.

4. The pakka arhatia is entitled to substitute his own contract in compliance with an order from his constituent so as to constitute himself a buyer or a seller as the case may be in respect of the said order. He is also entitled to enter into a cross contract with another constituent in fulfilment of an order from his first constituent.

5. The pakka arhatia is not bound to carry out the orders of his constituent. If an order is placed and he is unable to carry it out he must inform his constituent of his inability to carry out the order in good time. Even having once accepted an order the pakka arhatia is under no obligation to accept another cross buying or selling order from his constituent. All that he must do is to inform his constituent and in such a case the constituent is at liberty to find another arhatia for the subsequent order.

6. The constituent is not entitled to know the name of the merchant with whom the pakka arhatia has entered into contract in pursuance of his constituent's orders, nor is the merchant entitled to know the name of the constituent. They both must look to the pakka arhatia for the performance of the contract.

7. The pakka arhatia in addition to the price of goods is also entitled to charge a commission from his constituent. This commission is usually an accepted rate in the market unless modified by the contract between him and his constituent. In view of the special responsibilities which the pakka arhatia undertakes his commission rate is

usually higher than that allowed to an ordinary commission agent.

8. The pakka arhatia is entitled to demand margin money if the rise or fall in the market justifies it. The reasonableness and the necessity of the demand has to be justified by the pakka arhatia. He must show that the conditions in the market entitled him to call for margin money from his constituent. If the constituent does not pay the margin money the arhatia is entitled to close the contract and to recover the loss from his constituent but he must inform his constituent about the closure of the contract.

9. The pakka arhatia is not entitled to interest on the damages claimed by him for the breach of contract.

10. The starting point of limitation in case a transaction is closed before the due date is the due date and not the date on which the transaction is closed.

11. When an order is placed with a pakka arhatia it is understood that the order is to be carried out according to the current rate of the market.

12. The constituent is entitled to recover interest on the amount due to him from the pakka arhatia.

13. If the pakka arhatia, having once accepted, refuses or neglects to carry out the orders of his constituent he is not only liable for the performance of the contract but also for all damages suffered by the constituent by reason of the neglect or default of the pakka arhatia.

14. The pakka arhatia is always liable to render accounts to his constituent of the transactions between him and the constituent.

15. The pakka arhatia being a principal party to the contract between the constituent and himself, the plea of wager can be raised against the pakka arhatia.

These are in short the incidents of a pakka arhatia and his major rights and liabilities. The detailed rights and duties of a pakka arhatia whether in relation to his own constituent or with respect to a third party will be examined later on.

Kachcha Arhatia.

The distinction between kachcha and pakka arhatia had been legally recognized for the first time by Chandavarkar, J., in *Faqir Chand Lal Chand Vs. Doolub Govindji*¹

1. (1905) 7 Bom. L. R. 213.

although this distinction was known in business circle for a very long time. The system of kachchi arhat seems to be older than that of pakki arhat. The decision in Faqir Chand Vs. Doolub was followed in Kanji Vs. Bhagwan Das.¹ The position of a kachcha arhatia was discussed by the Bombay High Court in connection with the Bombay cotton market and the Bombay silver market. There are two decisions in regard to Bombay cotton market, namely Faqir Chand Vs. Doolub and Sobhag Mal Vs. Mukand Chand² and the position of kachcha arhatia in silver market has been discussed in three cases, namely, Abraham E. J. Abraham Vs. Binodi Ram Bal Chand,³ Abraham Vs. Sarup Chand⁴ and Kastur Chand Sadasukh Vs. Chunni Lal Murli Prasad.⁵ It should not be supposed that there is any difference between the positions of a kachcha arhatia in these two markets. It is only by way of chance that cases cropped up in cotton as well as in silver market in Bombay.

Lord Justice Warrington described the position of a kachcha arhatia in a Privy Council case⁶ as follows:—

Nature of
kachcha arhatia.

“When a kachcha arhatia enters into transactions under instructions from and on behalf of his up-country constituent with a third party in Bombay, he makes privity of contract between the third party and the constituent, so that each becomes liable to the other, but he also renders himself liable on the contract to the third party. He does not ordinarily communicate the name of his constituent to the third party, but he informs the constituent of the name of the third party. The position, therefore, as between himself and the third party is that he is an agent for an unnamed principal with personal liability on himself. His remuneration consists solely of commission, and he is in no way interested in the profits or losses made by his constituent on the contracts entered into by him on his constituent's behalf.”

This was the case in the cotton market. The position in the silver market is described by Kania, J., in Kastur Chand Vs. Chunni Lal⁷.

1. (1905) 7 Bom. L. R. 57. In appeal 7 Bom. L. R. 611 : 30 Bom. 205.

2. (1926) 28 Bom. L. R. 1376 : 51 Bom. 1.

3. Suit No. 997 of 1914 and unreported decision of Macleod, J., dated 22nd March 1915 (Bombay High Court).

4. (1917) 42 Bom. 224 : 19 Bom. L. R. 608.

5. Suit No. 1623 of 1935 unreported decision of Kania, J., dated 14th September 1936 (Bombay High Court).

6. Sobhag Mal vs. Mukand Chand (1926) 28 Bom. L. R. 1376 at 1379-80 51 Bom. 1.

7. Kastur Chand vs. Chunni Lal unreported judgment of Kania J. dated 14th. September 1936 in suit No. 1623 of 1935 (Bombay High Court).

"The mode of effecting transactions in silver by a Kachcha Arhatia in the Bombay market is as follows:— Sometimes the up-country client arranges his transaction with the Bombay merchant direct and the kachcha arhatia has merely to note the transaction as between himself and the Bombay merchant. In other cases he receives instructions from his up-country client to put through a certain transaction. In the ordinary course he instructs a broker to put through the transaction in the market and the broker reports to the arhatia that the transaction had been effected at a certain rate. When the broker informs the arhatia about the transaction having been effected at a particular rate, for a particular delivery, he does not at the same time necessarily mention the name of the third party with whom the transaction was arranged. Under the circumstances it would often happen that the arhatia may advise the client that the transaction has been put through as instructed by him and later in the day the broker would inform the arhatia of the name of the parties with whom the different transactions were arranged. After the particulars are so given, the arhatia makes entries in his rough *soda* book and these entries are signed by the broker in the first instance. The entries from the *Katcha soda* book are then taken to the *fair Soda book* and from there they are posted in the ledger. The *Rajuat* book is a separate book. In that the clerks of the respective parties give their signatures to show the acceptance or confirmation of the transaction....."

The learned Judge observed later on in his judgment,

"Having regard to these judgments and also the judgment of the Privy Council, and after briefly referring to *Abraham Vs. Sarup Chand and Mukundchand Vs. Sobhagnal*, it is not disputed that a katcha arhatia is an agent. But he is not merely an agent. He receives commission and is instructed to put through transactions. His duty is to effect transaction with a third party and not to appropriate them to himself. He is not obliged and it is not his practice to disclose his client's name to the merchants in Bombay. In law, when a transaction is thus effected, privity is established between the client and the merchant and if the client, before the due date, discloses himself and offers to perform the contract, it is the duty of the arhatia to see that the contract is performed either by giving or taking delivery as the case may be. One important aspect of the katchi arhat system is that although the Bombay merchant knows on whose account the transaction is put through, as in the case of *Abraham Vs. Sarupchand* and as the facts of the present case show that sometimes the transactions are directly negotiated by the client with the Bombay merchant and the arhatia is only asked thereafter to note the transactions in his name, the Bombay merchant does not enter the transaction in the name of the up-country client. Therefore although the Bombay merchant knows the name of the party on whose account the transactions may have been entered into, he insists on recognising the arhatia as the principal in the transaction and liable to him for the performance thereof. In his turn the arhatia has the right to enforce the transaction against the Bombay merchant. Correctly speaking it is not also a case of guarantee, because the obligation of the arhatia to the Bombay merchant does not depend on the failure of the up-country client to perform the contract. To the Bombay merchant the arhatia is the principal party liable on the transaction."

From the above decisions the following inferences can be drawn about the incidents of a kachcha arhatia:—

(1) The kachcha arhatia is an agent of his principal who always remains an undisclosed principal as far as the other parties to the contract are concerned.

Incidents of a
Kachcha arhatia.

(2) When an order is placed with a kachcha arhatia the contract is not complete unless it is executed with a third party in the market. Thus when the transaction is completed a contractual relationship is established between the principal and the third party through the kachcha arhatia.

(3) The kachcha arhatia holds himself personally responsible to the third party for the fulfilment of the contract, while to his own principal he holds out no such promise. The third party, however, knows that the kachcha arhatia is acting not on his own behalf but on behalf of a principal whose name is not disclosed to him. The result is that a privity of contract is established between the principal and the third party. The kachcha arhatia is merely an agent as far as his own principal is concerned. He conveys to him the name of the third party. He, however, does not convey the name of the principal to the third party with the result that he stands in the position of an agent acting for an undisclosed principal as far as the third party is concerned. He also undertakes with the third party a personal responsibility that the contract would be carried out. Thus, as far as the third party is concerned, both the kachcha arhatia and his constituent are liable. He can enforce the contract against the constituent through the kachcha arhatia. In case the constituent disowns the contract the kachcha arhatia would be liable. The constituent, however, can fix no liability on the kachcha arhatia for the fulfilment of the contract. He must sue the third party.

(4) The kachcha arhatia is merely entitled to his commission and is in no way interested in the profits and the losses of the transactions. It some times happens that the constituent enters into the transaction direct with the third party. In such a case the kachcha arhatia merely makes a note of the transaction and becomes entitled to his commission.¹

(5) As the privity of contract actually exists between the constituent and the third party the transaction

1. Champa Ram vs. Jailal A. I. R. 1927 All. 617, also 51 Bom. 1 : Sobhag Mal vs. Mukand Chand 28 Bom. L. R. 1376.

cannot amount to wager unless a common intention not to give or take delivery exists between the principal parties to the contract. Mere fact that a kachcha arhatia and his constituent agree to deal only in differences would not make the transaction a wagering contract unless the third party also enters into the agreement that goods will not actually change hands but there would be dealing in differences only.

Distinction between a pakka and kachcha arhatia.

1. Kachcha arhatia stands in relationship of merely an agent to his principal while the pakka arhatia, although bound to carry out the orders of his principal, stands as principal to principal with his own constituent for the performance of the contract.

2. The kachcha arhatia acts for an undisclosed principal as far as the third party is concerned and is responsible to him for the fulfilment of the contract and therefore the name of the constituent is not communicated to the third party while his own constituent knows the name of the third party with whom the contract has taken place. The pakka arhatia, however, is not liable to disclose the name of his constituent to the third party nor that of the third party to his own constituent. In this aspect, therefore, he is regarded as principal both in relationship to the constituent and the third party.

3. From the conception given above it necessarily follows that the kachcha arhatia is not entitled to substitute his own contract in compliance with the order of his constituent nor can he enter into a cross contract with another constituent in order to fulfil the order from his first constituent. The pakka arhatia is entitled both to substitute his own contract as well as to enter into a cross contract with another constituent in compliance with an order from the first constituent. Thus he can himself become the buyer or the seller as the case may be in respect of the order of his own constituent.

4. In case of a kachcha arhatia the privity of contract is established between the constituent and the third party, while in pakki arhat there is no such privity of contract between the constituent and the third party. They both have a direct contractual relationship with the pakka arhatia.

5. The kachcha arhatia guarantees the performance of the contract to the third party but not to his own constituent while the pakka arhatia holds out such a guarantee

to both the parties. The result is that in case of kachchi arhat the constituent must sue the third party for his remedies in case of a breach of contract, while in pakki arhat the constituent has no cause of action against the third party but a pakka arhatia himself. The third party, however, must sue the arhatia whether kachcha or pakka for the carrying out of the contract.

6. The genuineness of the contract in case of a kachcha arhatia is determined by the nature of the contract which he enters into with the third party on behalf of his own constituent. If the constituent and the kachcha arhatia decide that no delivery of goods would take place but only differences would be paid, it would not turn the contract into a wager unless and until the third party also joins this common intention. In case of a pakka arhatia an agreement between him and the constituent to deal only in differences and not to give or take goods would vitiate the contract no matter in which manner the order of the constituent is carried out by the pakka arhatia. The nature of the contract entered into by a pakka arhatia with the third party though not a conclusive evidence but would be a piece of evidence in determining whether the contract between the pakka arhatia and his own constituent amounts to wager or not.

7. The rate of commission of a pakka arhatia is generally higher than that of kachcha arhatia. The reason is that the pakka arhatia undertakes the fulfilment of the contract to either party while the kachcha arhatia is concerned merely with the bringing about of the contractual relationship between his own constituent and the third party.

The pakka arhatia in his function of screening his principal stands as a guarantee for the solvency of the other parties to the transaction. In this respect his position has been compared to a *del credere* agent. "A *del credere* agent is one who, usually for extra remuneration, undertakes to indemnify his employer against loss arising from the failure of persons with whom he contracts to carry out their contracts."¹ In Bowstead's Digest of Law of Agency (1932) 8th Edition a *del credere* agent is defined as, "A mercantile agent who, in consideration of an extra remuneration, which is called a *del credere* commission, guarantees to his principal that third persons with whom he enters into contracts on

Comparison of
pakka & kachcha
arhatia with del
credere agent.

1. Morris vs. Cleasby (1816) 4 M & S 566.

S. N. Dutt
Advocate High Court
Jammu & Kashmir
Srinagar.

behalf of the principal shall duly pay any sum becoming due under those contracts." In other words he stands in the position of a surety to his own principal and warrants the solvency of those with whom he introduces his principal. The undertaking, however, is not a guarantee to answer for the debt, default or miscarriage of another within the meaning of section 4 of Statute of Frauds.¹ The special commission which he receives is called *del credere* commission. It is a price or premium which is paid to him by his principal for the guarantee he gives that the third party with whom he, the agent, enters into contracts for his principal will duly perform his contract. He incurs only a secondary liability towards the principal. His liability is that of a surety for the persons with whom he deals for their solvency; it does not extend to pay in case of refusal by the other party based on a substantial dispute. In short he is an agent to bring about contractual relationship between the parties as well as a surety to his own principal for the solvency of the other party. The kachcha arhatia holds out no such guarantee to his own principal; rather he guarantees the performance of the contract to the party with whom he enters into a contract in pursuance of his principal's orders. The pakka arhatia, however, stands as a guarantee both to his own principal and the third party, if any, with whom he contracts on behalf of his principal. It should be noted that the position of a pakka arhatia is not of a mere surety. The constituent as well as the third party look to the pakka arhatia for the performance of the contract. The Bombay High Court remarked in a case,² "A pacca adatia is very like an ordinary *del credere* agent. He is a commission agent and something more. He receives orders from his constituents and places them in the open market as his own." Similarly the Allahabad High Court held in a case,³ "The position of a pakka arhatia is analogous to that of *del credere* agent who incurs a secondary liability towards the principal. His legal position is partly that of a surety for the parties with whom he deals to the extent of any default by insolvency or something equivalent." It should be noted that these cases do not put the whole position in respect of a pakka arhatia. His position is only analogous and not identical with that of a *del credere* agent. The liability of a pakka arhatia is higher than that of *del*

1. Conturier vs. Hastie (1856) 5 H. L. C. 673 Original trial (1852) 8 Ex. 40.

2. Govind Das Paras Ram vs. Burjorji Rattanji 19 I. C. 29.

3. Champa Ram vs. Firm Tulshi Ram Jai Lal A. I. R. 1927 All. 617. see also A. I. R. 1935 All. 1004 : 26 A. L. J. 81.

credere agent. A *del credere* is liable only as a surety against the insolvency of the other party, but where the other party forbears the performance the *del credere* agent is not liable. The pakka arhatia, however, would be liable as principal to principal. Thus the *del credere* agent, the kachcha arhatia, and the pakka arhatia are similar in their legal position in the sense that essentially they are all agents and each one of them holds out some sort of a guarantee to one or the other or both the parties. The dissimilarity lies in the fact that the guarantee given by them is different in character and the parties to whom the guarantee is given are not identical. The *del credere* agent is in the position of a surety to his principal, the kachcha arhatia is the reverse of the *del credere* agent in guaranteeing the performance of contract not to his principal but to the third party, and the pakka arhatia includes in himself the functions of both and something more standing in the position of a principal both in respect to his constituent and the third party. Sometimes the use of the word "guarantee" is objected to as being inappropriate in case of a pakka arhatia for he enters into contract on his own behalf. The argument that the pakka arhatia contracts on his behalf is not always correct. He may or may not do so and usually he does not. Jenkins, C.J., in *Bhagwan Das Vs. Kanji*¹ has observed, "Then again there runs through the evidence the idea that the word 'guarantee' is not inappropriate, though some of the witnesses under the stress of a skilful cross-examination repudiate its aptness. 'Guarantee' in the strict legal sense there can be none; the absence of privity with the Bombay merchant excludes it. (See section 126 of the Contract Act). But I doubt whether there was occasion to be so shy of the word in its non-technical sense. On the other hand I do not think there was the relation of principal and agent pure and simple." Therefore, there is nothing radically wrong in the use of the word guarantee in the description of the position of a pakka arhatia.

A mercantile agent is defined in Sec. 1 (1) Factors Act, 1889 (52 & 53 Vict., C. 45) and Sec. 2 Cl (9) of the Indian Sale of Goods Act as follows:—

Pakka arhatia compared with mercantile agent.

"The expression mercantile agent shall mean a mercantile agent having in customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods."

1. (1905) 30 Bom. L. R. 205.

The function of a pakka arhatia is higher than that of a factor or mercantile agent. Factor is an agent remunerated by a commission and entrusted with the possession of goods to sell them in his own name as apparent owner. He is an ordinary agent for the sale of goods and a pakka arhatia is not so in so far as he can sell the goods as his own.¹ A factor is only a special class of arhatia and much more limited in authority than a pakka arhatia.

Comparison between pakka arhatia and his client with purchaser and seller.

In certain respects the legal relationship between the client and the arhatia is that of vendor and purchaser whether the contract is written or oral or entered into by telegram.²

Difference between pakka arhatia and broker with personal liability.

The only difference between the relationship of a pakka arhatia and his constituent on the one hand and that of a broker personally liable on the contract he enters into and his client on the other is that in the latter case the broker enters into the contract as agent for the client, he being personally liable to the person with whom he contracts, while the pakka arhatia does not make the contract with third party as agent but as principal, the constituent having no right to be brought into contact with the third party.³ In case of contract entered into by the broker the privity of contract exists between the principal parties to the contract themselves, the broker being concerned only with his commission. The position of a broker with personal liability becomes analogous to that of a kachcha arhatia.

Duties of an arhatia.

1. Duty to carry out the instructions of the principal.

It is the duty of the arhatia to carry out the instructions given by the principal. The duty is common both to the pakka and the kachcha arhatia. The pakka arhatia enjoys certain privileges not enjoyed by ordinary agent but he is essentially an agent. The duty of the agent is to follow the directions given by his principal strictly. In a case⁴ the instructions given by the principal were to warehouse the goods at a particular place but the agent selected another equally good place at lower rent. By chance the goods were destroyed by fire. It was held that the agent was liable for he had neglected the directions given by his principal. If the agent deviates from the instructions of

1. Bapu Sahib vs. Isaac (1915) M. W. N. 519 : 29 I. C. 462.

2. Chhogmal vs. Jai Narain 20 I. C. 882 : 15 Bom. L. R. 750.

3. Mani Lal Raghunath Pd. vs. Radha Kishan Ram Jiwan 45 Bom. 386 : A. I. R. 1921 Bom. 238 : 62 I. C. 361 : 22 Bom. L. R. 1018.

4. Lilley vs. Doubleday (1881) 7 Q. B. D. 510.

his principal he is liable to compensate the principal. It is, however, open to the principal to ratify his error or deviation from the instructions.¹ Where no actual loss results from the agent's deviation from instructions nominal damages will be awarded to the principal.² So long as the agent obeys the instructions given he incurs no liability, even where the consequences turn out different from what the principal anticipated.³ An agent selling goods below the minimum fixed by the principal will be answerable for the consequent loss to the principal.⁴

There are, however, two exceptions to this rule:—

Exceptions to the rule.

(a) Where the order is ambiguous and the agent with bonafide intention adopts one interpretation the principal cannot hold the agent liable for not having adopted the other interpretation.

In *Ireland Vs. Living Stone*⁵ Lord Chelmsford remarked:—

“Now it appears to me that if a principal gives an order to an agent in such uncertain terms as to be susceptible of two different interpretations, and the agent bonafide adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised because he meant the order to be read in the other sense of which it is equally capable.”

(b) The agent need not follow any unlawful instruction. A house was to be auctioned “without reserve” but secretly he was instructed to sell at a reserve price.⁶ The agent disregarded it and he was held justified.

The kachcha arhatia is bound to carry out the instruction of his principal as is given to him. He can not deviate from the instructions without exposing himself to the charge of negligence or disobedience for his position is no better than that of an ordinary agent as far as his principal is concerned. This dictum has only a modified application in the case of a pakka arhatia. The pakka arhatia is bound to follow the orders of his principal only

1. *Allahabad Bank vs. Sheo Bakhsh* (1926) 2 Lucknow 198 : 97 I. C. 888 : A. I. R. 1926 Oudh 576.

2. *Manchuberi vs. John Tod* (1894) 20 Bom. 633; *Chalapatti vs. Surayya* (1902) 12 M. L. J. 375.

3. *Overind vs. Gible* (1872) 5 H. L. 480; *Commonwealth Portland Cement Co., vs. Weber* (1905) A. C. 66.

4. *Beni Prasad vs. Narain Das* A. I. R. 1930 Lahore 974 : 129 I. C. 287; *Foramji vs. Mst. Karam Devi* (1924) 66 I. C. 446; *Firm Mathura Dass vs. Firm Keshav Chand* A. I. R. 1925 Lahore 332 : 86 I. C. 567.

5. *Ireland vs. Living Stone* (1872) 5 H. L. 395 at page 416. (Also see *Seetha Laxmi vs. Narayana Swami* (1922) 15 L. W. 205.

6. *Bexwell vs. Christie* (1776) 98 E. R. 1150.

in so far that he should not act prejudicially to his principal. For instance, if the principal places an order the pakka arhatia is bound to execute the order at the current price in the market. He, however, is under no obligation to put the order in the open market. The principal cannot insist that the order should be placed with some third party or that it should be carried out in a particular manner. All that he is concerned with is that the order placed by him should be fulfilled, no matter whether the pakka arhatia undertakes upon himself to fulfil the contract or enters into a covering contract.

II. Duty to follow the customs of the market.

In the absence of any direction of the principal the customs of the market should be followed. It applies to both kinds of arhatias. Section 211 of the Contract Act lays down:—

“An agent is bound to conduct the business of his principal according to the directions given by the principal, or in the absence of any such directions according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and if any profit accrues he must account for it.”

In every market there are certain accepted conventions which the persons dealing with the market are bound to follow. In some markets the chambers of commerce have incorporated these practices and conventions into rules and the contracts entered into are subject to those rules. In others there are no written rules but the prevailing practices are always respected by the merchants. The constituent may or may not be conversant with all those practices. Therefore, when an order is placed it is presumed that it is subject to all commercial usages and modes of business of that market. If a constituent places order in a distant market through an arhatia he relies upon his agent's information about the usages prevailing in that locality.

III. Duty to exercise due care.

The arhatia should exercise due care in carrying out the transaction.

Where there are violent fluctuations in the market the order is generally placed at the current price. The arhatia is presumed to act in a manner which should be most beneficial to his constituent. Doubts and difficulties some times arise when the arhatia substitutes his own contract in compliance with an order placed by his constituent. It was held in a Sindh case¹ that an agent (pakka arhatia) who while

1. Raghunath vs. Ram Pratap A. I. R. 1935 Sindh 38 : 160 I. C. 6.

acting as agent himself deals as principal without the knowledge of the party is acting contrary to the spirit of section 211 to 214 of the Contract Act. If there be a question upon whom the burden lies it must be on the pakka arhatia to prove that the transaction is not disadvantageous to the principal. This decision is contrary to all other rulings of Bombay and Allahabad High Courts where it has been held that the pakka arhatia can act as principal to principal in dealing with his principal's goods. This case can be taken only authority for the proposition that the pakka arhatia should exercise reasonable care in disposing off his client's goods. If he has been careless he is liable for any loss arising thereby. He is not necessarily liable to enter into covering contracts. His liability does not go to the extent of making himself responsible to the principal where there can be no profit by reason of any stringency in the market.¹ The duty, however, applies with all force to a kachcha arhatia who would be liable for any carelessness.

In English Law a distinction has been made between the degree of care exercised by a gratuitous agent and agent for reward. A gratuitous agent is only bound to use such skill as he has,² unless he has given himself out as possessing special skill in which case he must use that skill which is expected of him during the circumstances. Where an agent acts for reward a higher standard is expected. The skill and diligence required are such as are reasonably necessary for the due performance of the undertaking and not merely those which the agent possesses.³ If he holds himself out as a member of a particular trade or profession, he represents himself as reasonably competent to carry out any business concerning that trade or profession.⁴ Consequently, he becomes liable if he has not exercised that care and diligence which is exercised in that business.⁵

What is reasonable care,
English law.

The Indian Contract Act has done away with these distinctions. The only distinction is between an ordinary agent and a skilled agent. The rule is contained in sec. 212 of the Contract Act which runs as follows:—

Indian law.

“An agent is bound to conduct the business of the agency

1. Champa Ram vs. Firm Tulshi Ram Jai Lal. A. I. R. 1927 All. 617 : 26 A. L. J. 81 : 105 I. C. 739.

2. Wilson vs. Brett (1843) 152 E. R. 737, 63 R. R. 528.

3. Grill vs. General Iron Screw Callier Co. (1866) I. C. 600 at 614; Beal vs. Saith Dewan Rail Co. (1864) 159 E. R. 560 : 140 R. R. 478.

4. Harwar vs. Cernelins (1858) 141 E. R. 94 : 116 R. R. 654.

5. Keppel vs. Wheeler (1927) 1 K. B. 577; Weld-Bhindell vs. Stephens (1920) A. C. 956.

with as much skill as is generally possessed by persons engaged in similar business; unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct."

The arhatia is liable to exercise his best discretion for the sale or purchase of goods entrusted to him. Even where the contract purports to give an agent an absolute discretion as to calling for margin money it is yet incumbent on him to show that circumstances exist for the reasonable exercise of that discretion.¹ The question of reasonable diligence is one of fact and depends on the particular agency and the facts of the case. The agent must not place reliance on the statement made by others but should ascertain the truth for himself before committing his principal to any particular course of action.² Illustration (b) to sec. 212 of the Contract Act is, "A, an agent for sale of goods having authority to sell on credit, sells to B on credit without making the proper and usual enquiry as to the solvency of B. B at the time of such sale is insolvent. A must make compensation to his principal." The rule can well apply to a kachcha arhatia or ordinary sale agent but the pakka arhatia, being personally liable to the principal, the principal need not insist on this degree of diligence. Whether he makes an enquiry into the financial position of those with whom he enters into covering contracts or not is purely a question for the protection of the pakka arhatia. Where the agent is specifically authorised to enter into a particular transaction he will not be liable even if the transaction turns out disadvantageous.³ It is open to the parties to exclude the obligation of diligence by special contract.⁴ Where a commission agent was in the habit of sending goods by rail uninsured and the principal had tacitly acquiesced, it was held that the agent was not liable for loss of the goods during transit.⁵

1. *Devshi Harpal vs. Bhikam Chand Ram Chand* A. I. R. 1927 Bom. 125 : 29 Bom. L. R. 147 : 100 I. C. 993.

2. *Sitram Pur Coal Co. vs. Colley* (1908) 13 C. W. N. 59 : 1 I. C. 351.

3. *Overind vs. Gible* (1872) 5 H. L. 480.

4. *Austin vs. Manchester Ry. Co.* (1850) 138 E. R. 181 : 84 R. R. 645 (express agreement to be liable for special loss) *Shells vs. Black Burne* (1789) 126 E. R. 94.

5. *Venkata Chalam vs. Punnu Swami* (1924) 20 L. W. 195 : (1924) M. W. N. 499 : A. I. R. 1925 Mad. 46 : 47 M. L. J. 312. *Nand Ram vs. Gokal Chand* A. I. R. 1933 Lah. 841.

But where the agent sent the goods in open truck at the principal's risk and the goods were destroyed the agent was held liable for negligence.¹

A person acting as skilled agent is expected to have reasonable skill and knowledge in regard to his duties.² But as a general rule if he exercises reasonable care and skill, he will not be liable for the consequences of a mere error in judgment.³ In particular cases the agent may be even answerable for the skill of workers employed by him.⁴

This duty is enjoined on all arhatias. It is the duty of the agent to keep true and correct account of all the transactions,⁵ and to be prepared to produce them before his principal.⁶

IV Duty to keep
and render
account.

Section 213 of the Contract Act lays down:—

“An agent is bound to render proper account to his principal on demand.”

The Judicial Committee in *R. Bhawani Singh Vs. Maulvi Misbahuddin*⁷ stated that principal and agent stand not only on a contractual position, but also in a fiduciary relationship and one of the terms implied is that the agent should render an account to the principal of his dealings with the property entrusted to him. The mere delivery of a set of written accounts is not sufficient. He should attend to explain them and produce the vouchers supporting the transaction.⁸ Where the agent fails to keep proper accounts, every adverse inference should be drawn against him.⁹

1. *Suraj Mal vs. Fateh Chand* A. I. R. 1930 Lahore 280 : 120 I. C. 529.

2. *Lee vs. Walker* (1872) 7 C. P. 121; *Jenkin vs. Bitham* (1855) 139 E. R. 384; 100 R. R. 297.

3. *Overind Osirney vs. Gible* (1872) 5 H. L. 480. *Lagunas Nitrate Co. vs. Lagunas Syndicate* (1899) 2 Ch. 392; *Raja Ram vs. Abdul Rahim* (1916) 31 I. C. 450.

4. *Nagendra Nath vs. Nagendra Bala* A. I. R. 1926 Cal. 988 : 97 I. C. 200; 43 C. L. J. 479.

5. *Gray vs. Haig* (1855) 52 E. R. 587 : 109 R. R. 396.

6. *Pearse vs. Green* (1819) 37 E. R. 327 : 20 R. R. 258; *Bevan vs. Webb* (1901) 2 Ch. 59.

7. A. I. R. 1929 Privy Council 119.

8. *Bharat Chandra vs. Kiran Chandra* (1925) 52 Cal. 766 : 90 I. C. 944 : A. I. R. 1925 Cal. 1069; *Madhusudan vs. Rakhal* (1916) 43 Cal. 248 : 30 I. C. 697 : 19 C. W. N. 1070 : 22 C. L. J. 552; *Shiv Chandra Roy vs. Chandra Narain* (1905) 32 Cal. 719 : 1 C. L. J. 232; *Ramchandra vs. Manick Chandra* (1881) 7 Cal. 428; *Lawless vs. Calcutta Landing and Shipping Co.* (1881) 7 Cal. 627; *Annoda Pd. vs. Dwarka Nath* (1881) 6 Cal. 754; *Ram Dass vs. Bhagwat Das* (1904) 1 A. L. J. 347 : (1905) A. W. N. 1; *Ganesh Das vs. Ganga Ram* A. I. R. 1930 Sind. 142 : 123 I. C. 228.

9. *Gray vs. Haig* (1854) 52 E. R. 587 : 109 R. R. 396; *Clarke vs. Tipping* 1846) 50 E. R. 352 : 73 R. R. 355.

The agent is liable to account only to his principal. An agent appointed by the administrator of the estate is liable to account only to him and not to the person who is actually entitled to the estate.¹ If there are more principals than one they should all combine in a suit for account against an agent.² Investigation into an agent's account is not an imputation of dishonesty.³ The liability of the agent to account is personal. His legal representatives are not liable to account in the same way in which an agent is, for there is no fiduciary relationship between the principal and the legal representatives of the agent. When the agent dies during the pendency of the suit, the suit might be carried on against his legal representatives.⁴ Under the Hindu law the sons and grandsons of an agent are liable to pay any money found due against him on the ground of pious liability.⁵ The liability is limited only to the extent of assets in their hands. In an account suit the death of an agent also changes the party on whom burden of proof lies. The plaintiff is bound to prove each item of the account he claims and the representatives are only to place all the available materials for an account before the court.⁶ The rule of accounting, however, has a limitation in the case of pakka arhatia. The principal is liable to take account of his own transactions and not of corresponding transactions which the arhatia might have entered into to protect himself against loss. Suppose A sells goods through B, a pakka arhatia. B might sell the same goods to others in the market but B is personally liable to A for the price and A cannot insist on entering into the details of the covering contracts which B has entered into with others in the market.⁷

Suit for accounts.

It very often happens that a principal sues his arhatia for the profits of those transactions which are profitable to him. The principal cannot do that. He must sue

1. Chidawharam vs. Pichappa (1907) 30 Mad. 243 : 2 M. L. J. 326.

2. Raghubar Dayal vs. Firm Pyare Lal A. I. R. 1933 Lah. 93 : 145 I. C. 178; Kadir Bux vs. Rai Cherunessa (1921) 62 I. C. 766.

3. Drysdale vs. Rosebury (Earl) (1909) S. C. 1121.

4. Maharaj Bahadur vs. Basant Kumar (1913) 17 C. W. N. 695 : 18 I. C. 876.

5. Rao Girraj Singh vs. Rani Raghubir Kuer 6. A. L. J. 667 : 31 All. 429 : 2 I. C. 118.

6. Venkata Charijulu vs. Mahava Pande (1921) 44 Mad. 214 : 61 I. C. 530; A. I. R. 1921 Mad. 407; Kumeda Charan vs. Asutosh Chattopadhyaya (1912) 17 C. W. N. 5:16 C. L. J. 282 : 16 I. C. 742; Prem Dass vs. Charan Das A. I. R. 1929 Lahore 362 : 117 I. C. 233. See also Concha vs. Murrieta (1889) 40 Ch. D. 543.

7. Chhogmal Bal Krishnadas vs. Jai Narain Kanhaiya Lal 20 I. C. 882; Bhagwan Dass vs. Kanji 30 Bom. 205 : 15 Bom. L. R. 750.

or complete adjustment of the rights and liabilities of all the transactions.¹ In a suit for accounts the principal need not prove that there was surplus in the hands of the agent. All that is needed is that the agent should be liable to account.² Whether the court can pass a decree in an account suit beyond its pecuniary jurisdiction is a subject of controversy between the various High Courts. The Allahabad and Madras High Courts held that it can pass a decree beyond its pecuniary jurisdiction,³ while the Calcutta and Bombay held the contrary view.⁴ In a suit for account by the principal decree may be passed in favour of an agent.⁵ It is to be noted that if the principal has got all the accounts of the agent in his possession he should not be allowed to sue the agent to render accounts and thus to put him in a disadvantageous position.⁶ An agent cannot sue the principal for account. He can only claim if any sum is due to him on accounts.⁷ But where an account is the only way in which the agent's right could be established, the principal may be called upon to render accounts. In a recent Lahore case, plaintiffs were insurance agents and the commission payable to them rested on the *primia* paid in all the policies affected through them, the court directed insurance company to render account of all the policies affected by the agents.⁸

There has been lot of controversy as to the place where the accounting should be done and payment should be made in respect to the transactions done by an arhatia. From this point of view the contracts usually entered into can be divided into two classes:—

Place of accounting.

1. *Godhan Ram vs. Johar Mull* (1912) 40 Calcutta 335 : 17 C. W. N. 67 : 17 C. L. J. 636 : 16 I. C. 583.

2. *Hurrinath vs. Krishna Kumar* (1887) 14 Cal. 335; *Raghunath vs. Ganpati Ji* (1904) 27 All. 374 : (1905) A. W. N. 3 : 1 A. L. J. 722; *Ram Dass vs. Bhagwat Dass* 1 A. L. J. 347 : 1905 A. W. N. 1.

3. *Sudarshan vs. Ram Prasad* (1911) 33 All. 97 : 7 I. C. 385; *Mohammad vs. Ala Bux* (1925) 47 All. 534 : A. I. R. 1925 All. 376 : 23 A. L. J. 216 : 86 I. C. 1055; *Kanhya vs. Venkata Narsayya* (1917) 40 Mad. 1 : 32 M. L. J. 221 : 5 L.W. 580 : 39 I. C. 439 : (1917) M. W. N. 367 (F. B.).

4. *Sarada Sundari vs. Akaramunnessa* (1924) 51 Cal. 737 : A. I. R. 1924 Cal. 783; *Bhupendra vs. Purna Chandra* (1916) 43 Cal. 650 : 15 C. W. N. 506 : 13 C. L. J. 132 : 8 I. C. 34; *Golap vs. Indra* (1909) 13 C. W. N. 493 : 1 I. C. 86 : 9 C. L. J. 367; *Hirjibhai vs. Jamshed Ji* (1913) 15 Bom. L. R. 1027.

5. *Purna Nand vs. Jagat Narain* (1910) 32 All. 525 : 7 A. L. J. 543 : 6 I. C. 163.

6. *Nalini Kumar vs. Gadadhar* (1929) 49 C. L. J. 245 : 120 I. C. 100 : A. I. R. 1929 Cal. 418.

7. *Firm Persa Ram vs. Ratan Chand* A. I. R. 1925 Sindh 173 : 78 I. C. 846; *Gopi Kisan vs. Padam Raj* ((1917) 37 I. C. 510 *Hanuman Bux vs. Bal Mukand* A. I. R. 1927 Lah. 701 : 104 I. C. 339; *Kesho Ram vs. Joti Swarup* A. I. R. 1932 Lah. 619 : 140 I. C. 15.

8. *Ram Lal vs. Asia Commercial Assurance Co.* A. I. R. 1933 Lahore 483 : 144 I. C. 505.

(a) Where there is a distinct stipulation that the accounting is to be done at a particular place.

(b) Where there is no such clause in the contract.

It usually happens that the contract entered into by the principal and the constituent contains a clause about the forum where a suit for account would lie and where accounting is to be done. The Bombay High Court has consistently adhered to the principle in case of pakka arhatia transactions that the contract entered into by the parties must be respected and given effect to. The Bombay cases¹ were all pakki arhat transactions and there was a clause in the contract that all suits for account or recovery of money would lie in court at Bombay. The constituents usually filed suits at places where they used to reside. The pakka arhatias later on filed suits at Bombay and prayed for an injunction for the stay of proceedings going on in the up-country courts. The Bombay High Court held that although it is correct that under section 10 C. P. C. the earlier case must go on but where the suit can lie both at Bombay and in the up-country courts the contracts entered into between the parties must be respected and the suits going on in the up-country courts were stayed. It was also argued in those cases that the Bombay High Court had no jurisdiction to issue injunction against courts lying in other provinces but it invoked its inherent powers and granted the injunction prayed for. The reason given was that the parties had entered into the contract for the convenience of the pakka arhatia and it would be very unjust and unfair for him to be moving about from place to place with all his account books and papers to contest suits brought by the constituents in courts other than at Bombay.

The Lahore High Court² is of the view that the parties by an agreement *inter se* divest a court of its inherent jurisdiction over the subject matter of a suit no more than they could confer jurisdiction upon it by consent

1. Tilak Ram chowdhry vs. Codu Mal Jetha Nand (1928) 30 Bom. L. R. 546 110 I. C. 727 : A. I. R. 1928 Bom. 175; The cross case Codu Mal vs. Tilak Ram in Lahore High Court was also stayed A. I. R. 1929 Lah. 12. Baldeo Sahai Suraj Mal vs. Sham Das Gopi Chand suit No. 655 of 1937 unreported judgment of Engineer J. of Bombay High Court dated 24. 5. 1937. Maritima Italiana Steamship Co. vs. Burjor Framroze (1929) 54 Bom. 278 : 32 Bom. L. R. 43.

2. Kidri Prasad Chhedi Lal vs. K. R. Khosla A. I. R. 1923 Lahore 425 : 75 I. C. 590; Jagan Nath Amar Nath vs. Burma Oil Co. Ltd. A. I. R. 1929 Lah. 605 : 119 I. C. 481; Mukandi Lal Munshi Lal vs. Noor Ilahi Abdul Ali A. I. R. 1934 Lah. 44 : 144 I. C. 828

where it had none. Jurisdiction on courts is conferred by statute and it can only be taken away by statute. The parties by mutual consent can no more take away the jurisdiction vested by law in any court than they confer upon it when it is not so vested. The Privy Council¹ also supported this view. The Court of the Judicial Commissioner of Nagpur² also dissented from the view of the Bombay High Court and followed the Lahore High Court. It may be mentioned here that the Lahore and the Nagpur cases were cases of ordinary commission agency but this has not any important bearing on the principles laid down by those courts. The state of law on this point, therefore, seems to be in a state of confusion as the Bombay High Court is opposed to all other courts on matters of principle. It is submitted, however, that where courts in different places have got jurisdiction to try the same case there seems to be no reason to hold why should not the contract entered into by the parties be respected. The view of the Bombay High Court seems to be based on principles of equity, justice and good conscience.

The next class of cases are those where there is no express agreement for payment at a particular place. Different principles have been followed in different cases. In *Kedar Mal Vs. Suraj Mal*³ a custom was pleaded that the place of payment is where the constituent resides or any other place at which the constituent may direct. The custom was held to be proved and was given effect to. A similar custom was pleaded in *Tika Ram Vs. Daulat Ram*⁴ but their Lordships did not follow the custom and held that the proper place was where the business of agency was carried out and not where the constituent resided. It also did not follow the view laid down in *Moti Lal Vs. Suraj Mal*⁵ where it was held that it was the duty of the debtor to find out his creditor and to make the payment at his residence. *Tika Ram's* case was followed in a number of cases.⁶ The proper law, therefore, seems to be that the

1. *Sevak Jeranchod Bhogi Lal vs. The Dakore Temple Committee* A. I. R. 1925 P. C. 155 : 27 Bom. L. R. 872 : 23 A. L. J. 555 : 87 I. C. 313.

2. *The National Petroleum Co. vs. F. X. Rebello* A. I. R. 1935 Nag. 48.

3. (1908) 10 Bom. L. R. 1230 : 33 Bom. 364 : 3 I. C. 441.

4. (1924) 46 All. 465 : 24 A. L. J. 591; A. I. R. 1924 All. 530 : 80 I. C. 661.

5. (1904) 30 Bom. 167 : 6 Bom. L. R. 1038.

6. *Panna Lal vs. Kissen Chand* (1927) 30 Bom. L. R. 1391 : A. I. R. 1928 Bom. 548; *Mohammad Haji Ahmad vs. Jute & Gunny Brokers Ltd.* (1930) 33 Bom. L. R. 1364. *Devi Datt vs. Sri Ram* (1932) 34 Bom. L. R. 236. *Tilak Ram vs. Kodu Mal Jetha Nand* (1928) 30 Bom. L. R. 546. *Sankal Chand vs. Amba Lal* (1930) 54 Bom. 192 : A. I. R. 1930 Bom. 150. *Jagan Nath vs. Burma Oil Co.* A. I. R. 1929 Lah. 605:119 I. C. 481. *Bhamboo Mal vs. Ram Narain* (1928) 9 Lah. 455 : 109 I. C. 28 : A. I. R. 1928 Lah. 297; *Ram Dass vs. Dhanpat* (1925) 6 Lah. 153: 88 I. C. 950 : A. I. R. 1925 Lah. 387.

place of accounting should be one where the business of the pakki arhat agency is to be transacted. This is of course subject to the proviso that there should be no contract between the parties about the place where accounting is to be done, and there should be no usage to the contrary.

Limitation for
pakki arhat
transaction.

It very often happens that when a forward contract is entered into a cross contract is entered before the due date. For instance if A purchases 100 bales of cotton for 30th. November he usually enters into a corresponding sale transaction for the same quantity of goods before the due date, *i. e.*, 30th. November. In this way the two contracts cancel each other and adjustment is made by the payment of differences. The question is whether the cause of action arises on the day on which the cross contracts balance each other or on the date fixed for the settlement of the contract (*i. e.*, the *raida day*). The question came up for decision in *Harakh Chand Vs. Sumati Lal*.¹ Fawcett, J., was of opinion that the plaintiff was suing on an alleged indemnity and that he had a cause of action when he had paid something out of his pocket. Mirza, J., on the other hand, was of opinion that the cause of action arose when the cross contracts balanced each other. There was no evidence in that case as to when the plaintiff was actually damnified and consequently an issue was remanded to the lower court. The lower court found that the plaintiff was damnified on the *raida day*. The court, therefore, held that the cause of action also arose on the *raida day*. It is not known whether the court considered that the plaintiff was damnified by a payment out of pocket made by him or merely by a balance being struck in his favour on the due date. The next case in which the question of limitation was discussed is *Ram Gopal Chunni Lal Vs. Ram Sarup Baldeo Das*.² The Chief Justice observed:—

“Where you have two contracts one for sale and the other for purchase of the same amount of the same class of goods, *e. g.*, one hundred bales of cotton, for settlement on the same day, the obvious intention of the parties is, I think, that the contracts should not be carried out according to their terms but should be treated as balancing each other. I think that in such a case, generally speaking, the parties intend that the contracts shall be cancelled, and that in lieu of the existing contracts, there shall be a fresh contract under which one party has to pay and the other to receive on the due date the difference, and that neither party is to insist on the original contracts being carried out according

1. (1929) 33 Bom. L. R. 1200 : A. I. R. 1932 Bom. 25 : 138 I. C. 481.

2. (1933) 36 Bom. L. R. 84 : A. I. R. 1934 Bom. 91 : 148 I. C. 1038.

to their terms. In my view the Court may readily infer such a fresh contract, either from the terms of the instructions for the second contract referring to an intention to close the first contract, or from the manner in which the contracts have been dealt with in the books, *e. g.*, by treating the first two contracts as cancelled, and replaced by a liability to pay or a right to receive the difference, or by other sufficient evidence. But in my opinion, the liability to pay or receive the difference on the contracts would only arise, in the absence of agreement to contrary, on the day fixed for the performance of the original contracts."

This is the correct position of law. While not subscribing to the legal fiction that the original contracts are cancelled and in lieu of them a fresh and implied contract takes place I think the conclusion is correct. It is well known in business circle that when the two contracts cancel each other they both are meant to be performed on the *vaida day*. The contracts being cross contracts in their nature cancel each other but the real settlement takes place on the day of settlement.

The *modus operandi* of such class of contracts and the intention of the parties is simple enough. It can be well illustrated by an example. Suppose A enters into a forward contract for purchase with B but before the due date A enters into a similar sale contract with C. All the parties to these contracts have a right of giving and taking of goods and money. As far as A is concerned it is useless waste of time and labour to take goods from B and pass it on to C. It is most convenient that A should receive only the amount of the profit or loss as the case may be and leave the contract to be settled between B and C. It should be remembered that on the due date each one of these parties has a right to call for or offer goods and in the alternative also to be satisfied with mere book adjustment of payment of difference in prices. Therefore it is clear that it cannot be said that the day of performance is the day on which A crosses purchase contract with that of sale. The contracts were really meant to be performed on the *vaida day*. Working on the same principle suppose B and C are the same person even in that case the contracts are meant to be performed on the *vaida day* and no party has a right to call for settlement or delivery of goods earlier. By crossing the contracts one is relieved of the responsibility of finding goods or money but it is not correct to say that he becomes entitled to call for the settlement of contracts from the other party before the *vaida day*. If before the due date B or C were to refuse the performance of the contract A would be liable to the other

parties on the due day as if the cross contract did not exist. Therefore the right to enforce the contract arises on the *raida day* and the cause of action must begin from that day and not the day when one party or the other enters into a cross contract for the sake of his convenience before the arrival of the day fixed for the settlement of the contracts.

V. Duty to seek instructions.

There are cases where the agent is in difficulty and cannot decide as to what to do. In such cases it is his duty to communicate with his principal and obtain his instructions. This duty is enjoined on the agent by section 214 of the Contract Act which provides:—

“It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal and in seeking to obtain his instructions.”

The principle is illustrated in *Thandavaroya Vs. Ahmad Botcha*.¹ In that case an agent was entrusted with goods to carry to a certain place. The agent in order to minimise the loss carried the goods to a different place, without communicating and obtaining instructions from his principal. The agent's judgment turned out to be wrong and loss took place. It was held that the agent was responsible for loss as he had not sought the instructions of his principal. There may be cases in which communication is not possible. Then the agent should use his best discretion in the interest of his principal. The *kachcha arhatia* is always liable to seek his principal's instruction but a *pakka arhatia* can deal with his principal's goods as his own. Once they have been entrusted to him he can deal with them as he likes within the terms of the contract. In matters of purchasing and selling the goods of his principal the *pakka arhatia* has ample discretion. The principal is only concerned with the supply of goods he wanted to purchase and the price of his goods he wanted to sell. It is not his business to see how his orders have been carried out.

VI. Duty to pay money of the principal in the hands of the agent.

This applies to both kinds of *arhatias* with equal force. Section 217 of the Contract Act confers on an agent a right to retain his principal's money for (1) advances made (2) expenses properly incurred and (3) remuneration earned. Section 218 provides that subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

1. (1927) M. W. N. 578

As a rule no interest is payable by an agent in respect of moneys received by him on his principal's behalf except under some contract express or implied¹ or where there has been some default on his part² such as dealing with money in breach of duty³ or failure to pay it over at principal's request.⁴ In such cases the interest is payable from the date of default.⁵

If the agent makes any gain by misconduct, *e. g.* bribery etc. the agent not only forfeits his commission but also has to account for and refund all gains made by illegal means as would be seen later on under the heading rights of an agent. If the money of the joint principals is received by the agent he is liable to account to them jointly and is not discharged by payment to one or more of them unless by the authority of all.⁶

The Indian Contract Act makes no mention of this duty but it is well recognised in English Law and also in commercial circles. The agent cannot use the information prejudicially to his principal.⁷ Where an agent does use such information to the disadvantage of the principal he may be restrained by injunction.⁸

An agent cannot set up title adverse to that of the principal either in himself⁹ or in that of a third person.¹⁰

This rule applies specially in case of goods which have been entrusted to him.¹¹ He is estopped from claiming his ownership for these goods against his principal.¹² A

VII. Duty not to use information obtained in the course of the agency against the principal.

VIII. Duty not to set up an adverse title.

1. (See Halsbury's Laws of England Vol. 1 1931 Ed. P. 249).

2. Webster vs. British Empire Mutual Life Assurance Co. (1880) 15 Ch. D. 169 C. A.

3. As by employing it in his own business Rogers vs. Bochm (1799) 2 Esp 702; Burdick vs. Garrick (1870) 2 Ch. app. 233.

4. Edgell vs. Day (1865) L. R. 1 C. P. 80; Harsant vs. Blaine, Macdonald & Co. (1887) 56 L. J. (Q. B.) 511 C. A. But mere retaining of money which he ought to pay over, but which he has never been required to pay, is not sufficient, in the absence of fraud Turner vs. Burkin Shaw (1867) 2 Ch. app. 488.

5. Edgell vs. Day Supra; Barclay vs. Harries & Cross (1915) 85 L. J. K. B. 115.

6. Lee vs. Sankey (1873) 15 Eg. 204.

7. Ambersize and Chemical Co. Ltd. vs. Menral (1913) 2 Ch. 239; Lamb vs. Evans (1893) 1 Ch. 218.

8. Roble vs. Green (1895) 2 Q. B. 315.

9. Lyell vs. Kennedy (1889) 14 app. cases 437; Williams vs. Pott (1871) L. R. 12 Eg. 149; Moroe vs. Peachey (1891) 7 T. L. R. 748.

10. Eames vs. Hacon (1881) 18 Ch. D. 347; Dixon vs. Haminord (1819) 2 B & ald. 310.

11. White vs. Bayley (1861) 10 C. B. (N. S.) 227; Bell vs. Marsh (1903) 1 Ch. 528 C. A.

12. Lyell vs. Kennedy Supra and Ward vs. Carttar (1865) L. R. 1 Eg. 29.

parties on the due day as if the cross contract did not exist. Therefore the right to enforce the contract arises on the *raida day* and the cause of action must begin from that day and not the day when one party or the other enters into a cross contract for the sake of his convenience before the arrival of the day fixed for the settlement of the contracts.

V. Duty to seek instructions.

There are cases where the agent is in difficulty and cannot decide as to what to do. In such cases it is his duty to communicate with his principal and obtain his instructions. This duty is enjoined on the agent by section 214 of the Contract Act which provides:—

“It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal and in seeking to obtain his instructions.”

The principle is illustrated in *Thandavaroya Vs. Ahmad Botcha*.¹ In that case an agent was entrusted with goods to carry to a certain place. The agent in order to minimise the loss carried the goods to a different place, without communicating and obtaining instructions from his principal. The agent's judgment turned out to be wrong and loss took place. It was held that the agent was responsible for loss as he had not sought the instructions of his principal. There may be cases in which communication is not possible. Then the agent should use his best discretion in the interest of his principal. The *kachcha arhatia* is always liable to seek his principal's instruction but a *pakka arhatia* can deal with his principal's goods as his own. Once they have been entrusted to him he can deal with them as he likes within the terms of the contract. In matters of purchasing and selling the goods of his principal the *pakka arhatia* has ample discretion. The principal is only concerned with the supply of goods he wanted to purchase and the price of his goods he wanted to sell. It is not his business to see how his orders have been carried out.

VI. Duty to pay money of the principal in the hands of the agent.

This applies to both kinds of *arhatias* with equal force. Section 217 of the Contract Act confers on an agent a right to retain his principal's money for (1) advances made (2) expenses properly incurred and (3) remuneration earned. Section 218 provides that subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

1. (1927) M. W. N. 578

account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction."

These two sections involve two duties (1) duty to disclose and (2) duty not to deal on his own account. The duty of disclosure applies in a limited sense to a pakka arhatia while the other duty does not apply to him at all. One peculiar feature of a pakka arhatia is that he can allocate his principal's contract to himself. It is a settled custom among merchants doing forward transaction that there is no obligation on the part of the pakka arhatia to find buyers and sellers. As between him and the client the business is finished when an order for sale or purchase is accepted.¹ Thus it is clear that the pakka arhatia, dealing as a principal can himself buy the goods of his principal or sell his own goods to him. He has also the option to deal on his principal's behalf in the open market but at all events he is responsible as a principal both to seller and buyer. He can also sue in his own name as he has an interest in the contract and is a principal to the extent of his interest in the contract.²

The necessary inference, therefore, is that a pakka arhatia is not bound to disclose to his principal as to the covering contracts he might have entered into in the market with others. Thus when A places sale orders with B a pakka arhatia, B can purchase himself or sell the goods to others but A cannot compel B to disclose the names and other details of the sale contract which B has entered into with others.³ It is in this sense that the duty of disclosure is limited. But the pakka arhatia cannot fraudulently withhold any material fact about the particular contract between himself and the principal. In *Damodar Vs. Sheo Ram*⁴ where an agent employed to buy grain delivered grain of his own to the principal at a rate higher than the market rate, it was held that he must account for the profit. It is a general practice that the principal entrusts the pakka arhatia with sale or purchase transactions at the prevailing market rate or to catch the best rate prevailing within a limited period. In such cases the arhatia is bound to disclose the full details about the market rates to his principal. He cannot enter into transactions at a rate disadvantageous

1. *Govind Das vs. Burjorji* 19 I. C. 29; *Chhogmal vs. Jai Narain* 20 I. C. 882.

2. *Firm Hardayal vs. Firm Krishna Gopal* A. I. R. 1938 Lah. 673.

3. 20 I. C. 882 *Supra*.

4. (1907) 29 All. 730 : (1907) A. W. N. 245 : 4 A. L. J. 587.

to his principal; otherwise he would be guilty of having made secret profit. The principal can either repudiate the transaction or call for the account of all profits made by the arhatia.

XII. Pakka arhatia liable for the performance of the contract.

The main obligation of a pakka arhatia is to find money for goods and goods for money or settle differences on due date.¹ There is a direct contractual relationship between the pakka arhatia and the purchaser and the seller, he, as principal, being liable to both for the performance of the contract. The failure of the purchaser who has entered into a forward contract for the purchase of the commodity through a pakka arhatia does not exonerate the arhatia from liability to take delivery from the seller in pursuance of the forward contract.² If the client sends goods for delivery on the due date the arhatia is responsible for the price whether he has covered himself or not.³ This is the main feature which distinguishes a pakka arhatia from other mercantile agents. This duty is peculiar to the pakka arhatia only.

Rights of an arhatia.

1. Right of remuneration.

A pakka arhatia is entitled to commission and brokerage⁴ in addition to the price of goods. The question whether he is entitled to interest is arguable. Two classes of cases can arise in which a pakka arhatia can make payment on behalf of his principal. Both these positions arise by virtue of the fact that he stands as an agent with respect to his constituent.

(a) A CLAIM FOR MONEY PAID BY THE AGENT ON BEHALF OF THE PRINCIPAL.

In this class are included those claims which the constituent is bound to pay but is actually paid by the agent, for instance, the price of goods supplied and the incidental expenses appertinent thereto. These claims are for determined amount and the agent is out of pocket to that extent. The agent is therefore in equity entitled to the interest on this amount.

(b) A CLAIM FOR DAMAGES BY THE AGENT.

A pakka arhatia usually bases his claim for damages, for instance, where the constituent had failed to perform the contract and the agent had to pay damages to others or

1. Govind Dass vs. Burjorji 19 I. C. 29 (Bombay).

2. Megh Raj vs. Anup Singh A. I. R. 1935 All. 1004 : 159 I. C. 984.

3. Chhog Mal vs. Jai Narain 20 I. C. 882.

4. Chhogmal vs. Jai Narain 20 I. C. 882.

damages arose out of settlement of claim between the arhatia and his constituent. Such claims and claims of like nature are really claims for damages. In such a case he is not entitled to any interest as it is a fixed principle of law that no damages can be allowed on damages. The question was considered in *Hukam Chand Sarup Chand Vs. Abraham E. J. Abraham*¹ and their Lordships remarked that the answer to the question whether the pakka arhatia is entitled to interest on the amount claimed by him depends upon the question, whether the claim made is a claim for damages or whether it is a claim for money paid by an agent on account of his principal. In a claim for damages where a pakka arhatia, relying upon his character as a principal, seeks to enforce a contract and thereby deliberately protects himself against enquiries which ordinarily are made about the amounts he has actually expended as agent on behalf of his principal, the damages claimed are unliquidated damages which have to be ascertained by the rate fixed in the original contract and the rate prevailing at the date of the breach of the contract.

It is clear, therefore, that no interest can be allowed for damages should not be allowed on damages and also because no party is liable to pay any interest on unliquidated damages. The amount is ascertained by the court and it is then that any claim for interest can be supported. It should be noted that the damages claimed by the pakka arhatia are not identical with the price of goods on which interest can be claimed under the Sale of Goods Act.

The amount of interest to be allowed is always within the discretion of the court and the interest should be allowed after the damages have been ascertained by the court. The rate should be one prevailing in the market. It is usually a bit higher than that allowed by the Bankers.

The two important items of remuneration always claimed by an arhatia are commission and brokerage. The amount is usually settled by the contract between the parties or by the rate prevalent in the market. The question, however, arises whether the right to remuneration accrues when the order is placed and accepted by the arhatia or when the contract is actually performed. In this respect there is a difference between a pakka and a kachcha arhatia. They occupy different positions in respect to their constituents. As seen above the kachcha arhatia is an

When right to remuneration arises.

I. (1918) 21 Bom. L. R. 783 : 52 I. C. 519.

G. N. Das

Advocate High Court

Jammu & Kashmir

ordinary agent as far as his principal is concerned but the contract between a pakka arhatia and the principal is that of principal to principal and it is completed when the arhatia has accepted the sale or purchase offer of his principal. The arhatia at once becomes entitled to his commission on the acceptance of the transaction. The kachcha arhatia earns his commission when the sale or purchase has been completed in the market. It is not necessary that he should enter into corresponding transactions in the market. In certain trades the arhatias earn double commission from both the parties. The hardware commission agents at Mirzapur earn double brokerage from both parties called "*Duhari Dalali*" and it is not considered as misconduct. The arhatia is also entitled to all incidental charges and expenses involved in the transaction.

Commission is ordinarily determined by the terms of the contract. The right to commission may also be implied from the conduct of the parties. When a professional agent is employed, the mere fact of employment may raise a presumption of a contract to remunerate him.¹ Remuneration in a kachchi arhat transaction becomes due only after the completion of the act. When an agent has been unsuccessful in putting the transaction through, he cannot sue even on the basis of *quantum meruit*, for instance commission on the sale of a house is due only on the completion of the sale,² but when the principal refuses to complete the transaction without sufficient reason, the agent will be entitled to damages.³

The agent, however, is not entitled to his remuneration when he is guilty of misconduct in the business of his agency: Sec. 220 of the Contract Act runs as follows:—

"An agent who is guilty of misconduct of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted."

In *Andrews Vs. Ramsay & Co.*⁴ when an agent for sale of property for £. 2100 who had been promised a brokerage of £. 50 received a secret commission of £. 20 .

1. *Mansar vs. Baibe* (1855) 2 Macg. 80, 149 R. R. 120.

2. *Ayyaimab Chetty vs. P. K. Subramania Iyer* 1923 M. W. N. 675 : IS L. W. 560 : 76 I. C. 756 : A. I. R. 1924 Mad. 212 : 45 M. L. J. 409; *Satchidanand vs. Nitya Nath* (1923) 50 Cal. 978 : A. I. R. 1924 Cal. 517 : 79 I. C. 287.

3. *Anna Swami vs. Zemindar of Aya Kudi* 1910 M. W. N. 199 : 6 I. C. 740; *Mehta vs. Cassimbhai* (1922) 24 Bom. L. R. 847 : 75 I. C. 193 : A. I. R. 1922 Bom. 433; *Reigate vs. Union Manufacturing Co.* (1918) 1 K. B. 592; *Tropalle vs. Martyn Bros.* (1934) 50 T. L. R. 228.

4. (1903) 2 K. B. 635.

from the purchaser, it was held that he was not only bound to refund the secret profit of £. 20 but also forfeited his remuneration.

Lord Alverton, C. J., said:

"A principal is entitled to an honest agent and it is only the honest agent who is entitled to any commission. In my opinion if an agent directly or indirectly colludes with other side and so acts in opposition to the interest of his principal he is not entitled to any commission."

The property in the goods bought by the pakka arhatia vests in him and does not pass to the principal as long as the principal does not pay the price. He can stop them in transit as he would have had if the relation between him and the principal had been that of buyer and the seller. He is also entitled to be indemnified against all losses and liabilities and to get all expenses incurred by him in exercise of his authority.¹ The lien existing in favour of the agent is generally a particular lien confined to claims arising in connection with the goods or property in respect of which the right is claimed.² For the exercise of lien the following conditions are necessary:—

II. Right of lien.

(1) The goods must be in the actual or constructive possession of the agent.³

(2) The possession must have been acquired by the agent without prejudice to his duties.⁴

Sections 217 and 221 of the Indian Contract Act lay down the rights of agent in respect of lien. These apply to pakka arhatias as well as to kachcha arhatias.

SECTION 217:—

"An agent may retain, out of any sums received on account of the principal in the business of the agency, all monies due to himself in respect of advances made or expenses properly incurred by him in conducting such business and also such remuneration as may be payable to him for acting as agent."

This section relates only to retention of money by an agent for advances made, expenses properly incurred, and his remuneration.

The section 221 relates to property.

SECTION 221:—

"In the absence of any contract to the contrary, an agent

1. *Bahasa Bakalle vs. Han Banna* A. I. R. 1932 Bom. 592 : 140 I. C. 571 : 34 Bom. L. R. 1293.

2. *Bock vs. Gorrisen* (1861) 45 E. R. 639 : 129 R. R. 136.

3. *Redway vs. Lees* (1856) 25 L. J. (Ch.) 584; *Bryans vs. Nix* (1839) 150 E. R. 1634 ; 51 R. R. 829 (constructive possession sufficient).

4. *Walsh vs. Provan* (1853) E. R. 1595.

is entitled to retain goods, papers, and other property, whether moveable or immoveable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him."

Taken in illegal transactions.

The agent is entitled to retain money even in illegal and void transactions but he must return all surplus money to the principal. Illegality of the transaction cannot be set up as a defence in the principal's action for account.¹ For instance, money received under a wagering contract must be duly paid to the principal.² When, however, the contract of agency itself is illegal the court will assist neither party to carry out the contract. Thus when an agent employed to effect insurance in breach of an act of Parliament received premia from some persons, it was held that the principal could not recover them.³ In a wagering contract an agent may recover from the principal losses incurred by him over wagers on behalf of the principal.⁴ Conversely, the principal may recover moneys received by an agent on his behalf in respect of such transactions.⁵

This rule, however, does not apply to the case of a pakka arhatia. He acts as principal to principal. In *Burjorji Vs. Bhagwan Dass*⁶ the plaintiffs were a firm of pakka arhatias in Bombay and the defendant a young Parsi who had won a large sum of money in sweepstake. The defendant entered into speculative transactions in American futures and fine Broach. The transactions resulted into loss. The plaintiffs sued for the recovery of money due for the loss. It was found that the transactions were wagering contracts and the plaintiffs' suit was dismissed.

Section 221 deals with the retention of goods. The goods must be in possession of the agent. Even constructive

1. *Demattos vs. Benjamin* (1894) 63 L. J. Q. B. 248; 10 T. L. R. 221; *Bridger vs. Salvage* (1885) 15 Q. B. D. 363; *Tenant Vs. Elliot* (1797) 126 E. R. 744; 4 R. R. 755; *Bhola Nath vs. Mulchand* (1903) 25 All. 639; (1903) A. W. N. 161; *Palainappa vs. Chockalinga* (1921) 44 Mad. 334; A. I. R. 1921 Mad. 334.

2. *Bhola Nath vs. Mulchand* (1903) 25 All. 639; (1903) A. W. N. 161.

3. *Thompson vs. Thompson* (1802) 32 E. R. 190; 5 R. R. 151.

4. *Pirthi Singh vs. Matu Ram* A. I. R. 1932 Lah. 356; 138 I. C. 241; *Chowdhri Bidhi Chand vs. Kaechhu Mal* (1923) 45 All. 503; 73 I. C. 477; A. I. R. 1923 All. 585; *Arjan Dass vs. Walaiti Ram* A. I. R. 1928 Lah. 420; 108 I. C. 58; *Ally Molla Industrial Corporation vs. Esmail* A. I. R. 1925 Ran. 284; 90 I. C. 676; *Pringle vs. Jaffar Khan* (1883) 5 All. 443.

5. *Hardeo Dass vs. Ram Prasad* (1927) 49 All. 438; 25 A. L. J. 223; 100 I. C. 774; (1927) 7 Ran. 300; 119 I. C. 740; A. I. R. 1929 Ran. 244; *Ram Prasad vs. Ramji Lal* (1927) 25 A. L. J. 736; A. I. R. 1927 All. 795; 103 I. C. 218; *Bhola Nath vs. Mulchand* (1903) 25 All. 639; *Shibhu Mal vs. Lachman Das* (1900) 23 All. 165.

6. 38 Bom. 204.

possession would suffice.¹ But possession got by misrepresentation is ineffectual.² The lien is limited by the extent of the principal's rights in the goods. The principal must have the power to create lien otherwise there can be no lien by the agent.³ The lien, however, is subject to the rights of a third party.⁴ The exception is in the case of a negotiable instrument in which the rights of third parties will not prevail, if the agent acted bonafide.⁵

The right of a lien of a sub-agent depends on whether he has been employed with the consent of the principal or not. If he has been employed without his consent there is no right of lien.⁶ If he has been employed with his consent he has the same rights of lien as the agent has about his claims arising in the course of sub-agency.⁷

If the sub-agent does not know that his employer is an agent but is under the bonafide belief that he is the principal, then the lien will be to the same extent as if the agent were the owner of the goods.⁸ If the sub-agent knows that his master is merely an agent his right will be limited to the extent of the rights of the agent.⁹

If the agent or sub-agent voluntarily parts with possession of goods the right of lien is lost.¹⁰ If the possession is lost by fraud or other illegal causes the lien is not lost.¹¹ The lien may come to an end if the agent enters into an agreement which is not in keeping with the continuance of the lien.¹² Express or implied waiver may also extinguish

Sub-agent's lien.

Extent of the lien.

When lien becomes extinct.

1. Bryans vs. Nix (1839) 150 E. R. 164 : 51 R. R. 829.
2. Madden vs. Kampster (1807) 170 E. R. 859.
3. Cunliffe Brooks & Co. vs. Blackburn Building Society (1884) 9 A. C. 857.
4. Hallins vs. Claridge (1813) 128 E. R. 549 : 39 R. R. 662; Pratt Vs. Vizard (1883) 110 E. R. 989 : 39 R. R. 660; London & Country Bank vs. Ratcliffe (1881) 6 A. C. 722.
5. Solaman vs. Bank of England (1791) 104 E. R. 319 : 12 R. R. 341; Bank of New South Wales vs. Goulburn Valley Butter factory (1902) A. C. 543; Misa vs. Currie (1876) A. C. 554.
6. Sally vs. Rathbone (1814) 105 E. R. 392.
7. Fisher vs. Smith (1878) 4 A. C. 1.
8. Maun vs. Forrester (1814) 171 E. R. 20 : 15 R. R. 724; Westwood vs. Bell (1815) 171 E. R. 111 : 16 R. R. 800; Tayler vs. Kymer (1832) 110 E. R. 120 : 37 R. R. 433; Martague vs. Forwood (1893) 2 Q. B. 350.
9. Mildred vs. Mastons (1883) 8 A. C. 874; Levy vs. Barnard (1818) 129 E. R. 340 : 19 R. R. 484; Snook vs. Davidson (1809) 170 E. R. 1134 : 11 R. R. 696.
10. Bligh vs. Davies (1860) 54 E. R. 346 : 126 R. R. 95; Sweet vs. Pym (1800) 102 E. R. 2 : 5 R. R. 497; (agent delivering goods over which he has lien on board a ship for transport at the principal's risk); Hattison vs. Laing (1873) 17 Eg. 79; Sakar Chand vs. Premji A. I. R. 1930 Sindh 130 : 120 I. C. 502.
11. Wallace vs. Woodgate (1824) 171 E. R. 1323 : Re Carter (1886) 55 L. J. Ch. 230. (Possession obtained from agent unlawfully).
12. The Rain Lead (1885) 53 L. T. 91; Forth vs. Simpson (1849) 116 E. R. 1423 : 78 R. R. 496; Have vs. Kirchner (1856) 14 E. R. 602 : 111 R. R. 60.

the lien.¹ An inference about implied waiver may be drawn if the agent takes other security for the claim provided the circumstances in which it was taken point to an intention to abandon the lien.² The lien is not lost by the principals becoming bankrupt³ or having disposed of the goods.⁴ Agent has also the right to stop in transit the principal's goods, when the agent has purchased goods out of his fund.⁵

III. Right of indemnity.

In *Thacker Vs. Hardy*⁶ Lindley, J., said:—

“Every agent is entitled to indemnity against liabilities incurred by him in executing the orders of his principal unless those orders are illegal or unless the liabilities are incurred in respect of some illegal conduct of the agent himself or by reason of his default.”

Section 222 of the Contract Act reads:—

“The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.”

The two important words in this section are “Lawful acts” and “in exercise of the authority conferred upon him.”

Lawful act.

Where the agent makes cash payments on account of wagering transactions (which are only void) for his principal, the principal is bound to reimburse the agent.⁷ It should be noted that wagering contracts are only void and not unlawful. This ruling, however, applies only to *kachcha arhatia* or an ordinary agent. It does not apply to *pakka arhatia*. *Pakka arhatia* stands in the position of a principal and so it can successfully be pleaded that the contracts are wagering transactions.⁸

1. *Weeks vs. Goode* (1859) 141 E. R. 499:120 R. R. 164; *Jacobs vs. Latour* (1823) 130 E. R. 1010.

2. *Re Morris* (1908) 1 K. B. 473; *Re Douglas* (1898) 1 Ch. 199; *Groom vs. Cheese Wright* (1895) 1 Ch. 730; *Cowell vs. Simpson* (1809) 33 E. R. 989:10 R. R. 181.

3. *Robson vs. Kemp* (1802) 170 E. R. 703:8 R. R. 831; *Re Capital Fire Insurance Association* (1883) 24 Ch. D. 408.

4. *West of England Bank vs. Batchelor* (1882) 51 L. J. Ch. 199.

5. *Jenkins vs. Brown* (1849) 117 E. R. 193; *Cassablon vs. Gible* (1883) 11 Q. B. D. 797; *Imperial Bank vs. London & St. Katherine's Docks* (1877) 5 Ch. D. 195.

6. *Thacker vs. Hardy* (1874) 4 Q. B. D. 685 at 687.

7. *Shibho Mal vs. Lachman* (1901) 23 All. 165:(1901) A. W. N. 33; *Chekka vs. Gajjila* (1904) 14 M. L. J. 326; *Bhola Nath vs. Mulchand* (1903) 25 All. 639:(1903) A. W. N. 161; A set off or adjustment of account of third parties will stand on the same footing, see *Prithi Singh vs. Matu Ram* A. I. R. 1932 Lah. 356:138 I. C. 241.

8. *Burjorji vs. Bhagwan Dass* (1913) 38 Bom. 204.

In order to earn the right of reimbursement the agent must have acted within the scope of his authority.¹ Where the agent in disobedience to his principal's instructions made settlement of transactions in future before due date he was held not entitled to reimbursement from the principal.²

Within the scope of his authority.

Section 223 lays down in regard to unlawful acts:—

“Where one person employs another to do an act and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury against the rights of third persons.”

This section is based on the well known English case *Belts Vs. Gibbins*.³ An act done with the knowledge that it is unlawful is not done in good faith and gives no right to indemnity but where one party induces another to do an act which is not legally supportable and yet it is not clearly in itself a breach of law the party so inducing shall be answerable to the other for the consequences. Where however the act is known to be unlawful to the agent he loses his right to indemnity.⁴

Section 224 runs as follows:—

“Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise to indemnify him against the consequences of that act.”

In English law, however, an agent is entitled to be indemnified if he innocently commits a crime in ignorance of real facts.⁵

Section 225 of the Contract Act provides:—

“The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.”

1. *Firm Samas Din vs. Agha Mohammad* (1922) 59 I. C. 971 : 3 L. L. J. 141.

2. *Firm Mathura Dass vs. Firm Jiwan Mal* (1928) 9 Lah. 7 : A. I. R. 1928 Lah. 196: 112 I. C. 29 and also see *Jobinson vs. Kiarby* (1908) 2 K. B. 82 and 514.

3. (1834) 111 E. R. 22 : 41 R. R. 381; *Firm Madhavji vs. Yar Hussain* A. I. R. 1926 Sindh 40 : 88 I. C. 980; (cf) *Re Famatina Development Corporation* (1914) 2 Ch. 271 (Costs of action on a libel made by agent in a report made on behalf of principal - principal liable to pay).

4. *Josephs vs. Pebrer* (1825) 107 E. R. 870 (purchase by agent of shares in a company known to be acting as such without charter); *Allkins vs. Jupe* (1877) 2 C. P. D. 375 (effecting an insurance known to be illegal); *Re Parker* (1882) 21 Ch. D. 408 (election agent making illegal payments under Corruption Practices Act); *Ex Parte Matber* (1797) 30 E. R. 1060 (agent buying smuggled goods for the principal).

5. *Burrows vs. Rhodes* (1899) 1 Q. B. 816.

The agent, however, would not be entitled to compensation where he is guilty of contributory negligence or the injury is suffered as a result of common employment with his brother servants.

IV. Right to enforce the contract against the principal.

This right is peculiar to pakka arhatia only. As said before he stands as principal to principal with his master. According to the custom of the *Marwaris* doing forward business there is no obligation on the part of the pakka arhatia to find buyers and sellers. As between himself and the client the contract is finished when an order for sale or purchase is accepted. Whether the pakka arhatia takes the risk himself or covers himself by selling again is entirely within his own discretion. The selling client cannot claim as of right the benefit of any covering contract entered into on the same day as his sales, because no privity exists between him and the opposite contracting party; there being, in fact, no parties to the selling contract but the client and his arhatia who is the buyer.¹ A pakka arhatia is under no obligation to substitute a fresh contract to meet the order of his first constituent.² So a pakka arhatia can allocate his principal's contract to himself when it suits him to do so.³ Acting as he does as a principal to principal it is a prevailing practice to purchase his principal's goods himself or to sell his own goods to his principal. Once the contract is complete between him and the principal he is well entitled to demand the performance of the contract.

V. Pakka arhatia's right to call for margin money.

A pakka arhatia is entitled to call for margin money if rise or fall in the market justifies the demand for it.⁴ The onus clearly lies on him to establish that circumstances arose which justified the exercise of this power. Even where the contract purports to give an absolute discretion as to call for margin money, it is yet incumbent on him to show that circumstances exist for the reasonable exercise of that discretion.⁵ The right to call for margin money seems to be the settled view of the Bombay High Court⁶ and the same view has been held by the Allahabad High

1. Chhogmal vs. Jai Narain 20 I. C. 882.

2. Bhagwan Dass vs. Kanji 30 Bom. 205.

3. Bhagwan Das vs. Burjorji 19 I. C. 29 (Bombay).

4. Devshi Harpal vs. Bhikam Chand Ram Chandra (1927) 29 Bom. L. R. 147.

5. Diwan Chand Kirpa Ram vs. Weld & Co. (1925) 28 Bom. L. R. 1488 P. C.

6. Sakarbhai Hukam Chand vs. Rammik Lal Keshav Das (1931) 34 Bom. L. R. 709.

Court¹ where the mercantile usage about the pakka arhatia at Ghaziabad was discussed. He was held justified in making a demand for margin money according to the rise and fall in the market and was entitled to close the transaction and to sue his constituent for the recovery of the loss suffered by him in case of failure to pay the margin money by the constituent in due time. The right to call for margin money arises only in the case of an ordinary forward contract. It does not apply to a Teji-Mandi transaction. In a Bombay case² Rangnekar J., held that even in Teji-Mandi transaction the pakka arhatia was entitled to demand margin money from the constituent. With due respect to the learned Judge it is difficult to agree with his decision. The nature of Teji-Mandi transaction has been explained in a number of cases. The constituent has only to pay a fixed premium which the arhatia can insist to be paid in full. The learned Judge held that he has also a right to demand margin money against the fluctuations in the rate of the premium and if default is made by the constituent the arhatia can close the transaction before the due date. It must be said that this remark is against the very nature of Teji-Mandi transaction. The transaction and the rate of premium are settled on the date when the constituent places the order with the arhatia and the arhatia accepts it. The constituent is not concerned with further fluctuations in the rate of premium. The arhatia is bound to keep the transaction alive till the due date for it is upto the due date that the constituent can exercise his option.

Liability of the constituent to third persons:—

The liabilities of the principal to third persons and those of the agent to the third parties enumerated below generally apply to kachcha arhatias only. The pakka arhatia deals as principal with the third party. So his liability is only that of a buyer or seller. Suppose A places a sale order with B, a pakka arhatia, B can either purchase the goods himself or put the sale order in the open market with the third party C. In both the cases B is responsible to A as purchaser and to C as seller. A is not responsible to C at all for the contract. Similarly B is responsible to C as principal contracting party. The kachcha arhatia, however, is more or less in the position of an ordinary

1. *Megh Raj vs. Anup Singh* A. I. R. 1935 All. 1004.

2. *Sakarbhai vs. Ramnik Lal* (1931) 34 Bom. L. R. 709.

agent and thus his master is under certain liabilities to third persons.

1. Principal bound by the acts of the agent.

The principal is bound by all acts done by the agent within the limit of his authority actual, apparent, and ostensible.

Section 226 of the Contract Act provides:—

“Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.”

Ostensible authority of agent.

The principal is bound by every act of the agent if he is clothed with general authority to conduct any business provided the act should be incidental to such business¹ and which should be within the apparent scope of the agent's authority. It is often called “ostensible authority” of the agent.² Where the agent's authority is subject to limitations and the third party has notice thereof the principal will not be bound by any act done by the agent in excess of his limited authority.³ In the absence of any such notice the third party is not bound by any secret instruction given to the agent.⁴

Lord Ellenborough C. J., said.⁵

“Strangers can only look to the acts of the parties and to the external indicia of property and not to the private communications which may pass between a principal and his broker; and if a person authorises another to assume the apparent right of disposing off property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of authority with which he has been apparently clothed by the principal in respect of the subject matter; and there would be no safety in mercantile transactions if he could not.”

Where an agent buys goods on behalf of the principal the property in them vests in the principal as soon

1. Edmund vs. Bushell (1865) 1 Q. B. 97; Re Drabble Bros (1930) 2 Ch. 211.

2. Havard vs. Sheward (1866) 2 C. P. 148; Meyer & Co. vs. Sze Hai Tong Banking Co. (1913) A. C. 847.

3. Rickitt vs. Barnett (1929) A. C. 176; Russo Chinese Bank vs. Liyan Sam (1910) A. C. 174 (cases of actual notice of limitations); Underwood vs. Bank of Liverpool (1924) 1 K. B. 775; Cuttibert vs. Roberts (1909) 2 Ch. 226 (cases of constructive notices).

4. National Bolivian Navigation Co. vs. Wilson (1880) 5 A. C. 176.

5. Pickering vs. Busk (1812) 104 E. R. 758 : 13 R. R. 364.

as they are appropriated.¹ This applies to kachcha arhatia but in the case of pakka arhatia the goods vest in the arhatia and not in the principal.² In other respects the acts done within the scope of authority of the pakka arhatia bind the principal. Where a Station Master has power to accept bailment of goods and he accepts the bailment, the Railway Co. will be liable for all consequences flowing from such bailment.³

A principal is bound by the act of the agent even if the agent in doing it was acting in fraud of the principal⁴ or otherwise to the detriment of the principal.⁵ Doctrine of Estoppel.

The doctrine of estoppel is incorporated in Sec. 237 of Contract Act which runs as follows:—

“Where an agent has without authority done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by words or conduct induced such third persons to believe that such acts and obligations were within the scope of agent’s authority.”

In *Soanes Vs. London & South Western Railway* the plaintiff entrusted his luggage to a porter of the railway station. He was putting on the uniform of the railway company. The luggage was stolen and Soanes sued the company. It was contended that the porter was off duty so was not the agent of the company at the time of entrustment. It was held that the company had held the porter out to be their authorised agent and so it was liable. In *Fazal Ilahi Vs. East India Railway*⁷ crackers were consigned for carriage from Cawnpore to Allahabad and the parcel clerk of the Railway Company accepted the parcel and received the charge of Rs. 3/8/-. It was subsequently found that under the rules of the company the crackers could not be sent by parcel but could only be sent by goods train. So a charge of Rs. 19/8/- was demanded which the plaintiff refused to pay. Consequently the crackers were delayed and the season having passed had to

1. *Dhanpat vs. Hari Charan* (1925) 29 C. W. N. 121 : 82 I. C. 683 : A. I. R. 1925 Cal. 284; *Goverdhan Das vs. Daulat Ram* A. I. R. 1926 Sindh 238 : 94 C. 287.

2. *Bahasa vs. Hanbanna* A. I. R. 1932 Bom. 593 : 140 I. C. 624.

3. *Munna Lal vs. E. I. Ry.* A. I. R. 1923 All. 71 : 82 I. C. 772; See also *Hari Singh vs. Secretary of States* (1931) 133 I. C. 881 : A. I. R. 1932 Lah. 34.

4. *Hambro vs. Burnard* (1904) 2 K. B. 10; *Montague vs. Perkins* (1853) 22 L. J. (C. P.) 187; *Simmers vs. Solomon* (1857) 26 L. J. (Q. B.) 301.

5. *Hawkins vs. Bourne* (1841) 8 M & W 703; *Havard vs. Sheware* (1866) L. R. 2. C. P. 148; *Wing vs. Harvey* (1854) 5 De. G. N. & G. 265 : 29 Digest 56.

6. (1919) 35 T. L. R. 367.

7. (1921) 43 All. 623 : 64 I. C. 368 : A. I. R. 1922 All. 324 : 19 A. L. J. 654.

be sold at a ridiculously low price. The court held that parcel clerk was the agent of the company and also had an ostensible authority to accept the goods for transit and therefore the company was bound by the act of the clerk even if he acted against the rules of the company.

It is of the essence of an authority created by "holding out" that the other party should have been induced to enter into the transaction by reason of the holding out.¹ In *Ram Pratap Vs. Marshall*² an agent made a contract in excess of his authority with a third party who honestly believed that the agent had the authority to the extent apparent to him. It was held that the principal was bound by the contract on the principle of the holding out. In *Darbari Lal Vs. Sharif Hussain*³ a licenced auctioneer sold a house at a price lower than that fixed by the owner to a third person. The owner admitted the authority given to the auctioneer for the sale of the house and thereby induced the purchasers to believe that the auctioneer was competent to sell the house at that price. It was held that the owner was bound by the auction sale and was liable to the third party for breach of contract.

Ratification by
the principal.

Where the agent acts beyond his authority and the principal ratifies it the principal is bound by the entire act; but if he disowns the act the principal will not be liable.

Exception.

There is, however, one exception. If an agent exceeds his authority but the excess can be separated the principal will be bound by that portion only which was within the authority of the agent.

The law is laid down in section 227 of the Contract Act:—

"When an agent does more than he is authorized to do, and when the part of what he does, within his authority, can be separated from that part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and his principal."

Where, however, the separation is not possible the principal can disown the whole act. This is provided by section 228:—

"Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction."

1. *K. S. R. M. Chettier Firm vs. A. T. K. P. L. S. P. Chettier Firm* (1934) 12 Rang. 7 : A. I. R. 1934 Rang. 6.

2. (1899) 26 Cal. 701; *Russo Chinese Bank vs. Liyan Sam* (1910) 14 C. W. N. 381 : 5 I. C. 789 (P. C.)

3. A. I. R. 1929 Lah. 822 : 121 I. C. 511.

In an English case *Baines Vs. Ewing*¹ an insurance broker authorized to under-write policies for amounts not above £ 100, underwrote one in favour of the plaintiff for £ 150. It was held that the contract was not divisible and the plaintiff was not entitled to recover even £ 100. In India in *Prembhai Vs. Brown*² a partner of a firm who had been authorized to draw bills to the amount of Rs. 200/- only drew a bill for Rs. 1,000/- in the name of the firm. It was held that the liability of the firm could not be separated and the firm was not liable even for Rs. 200/-. On the same principle an agent having authority to contract for the delivery of goods by the end of January entered into contract for delivery by middle of January; it was held that the principal was not liable to deliver even by the end of January.³

The principal is bound by the fraud and misrepresentation committed by the agent.

Section 238 lays down:—

II. Misrepresentation and fraud committed by the agent.

“Misrepresentation made, or frauds committed by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentation made or frauds had been made or committed by the principals; but misrepresentation made or frauds committed by agents, in matters which do not fall within their authority, do not affect their principals.”

The principal is bound by the fraud, misrepresentation, and other misfeasances of the agent committed in the course of employment. It is immaterial that the principal did not authorise the acts or had knowledge of them or had even forbidden them. If any tort is committed by the agent beyond the scope of his authority the principal is not liable except if the tort was committed by his express authority or he ratified it.⁴ In case of fraud committed by the agent it is immaterial whether the fraud was committed for the benefit of the principal or for the benefit of the agent.⁵ The leading case on the subject is *Lloyds Vs. Grace, Smith & Co.*⁶ In that case

1. (1866) 1 Ex. 320 : 143 R. R. 754.

2. (1873) 10 B. H. C. R. 319.

3. *Arlappa Naick vs. Naksi Keshavji* (1871) 8 B. H. C. A. C. 19; see also *Fry vs. Smellie* (1912) 3 K. B. 282 (Pledge by agent for a sum less than that named by the principal).

4. *Sherjan vs. Alimuddi* (1915) 43 Cal. 511 : 23 C. L. J. 225 : 34 I. C. 598 : 20 C. W. N. 268; *Kama Swami vs. Kanthayyan* (1899) 9 M. L. J. 57.

5. *Din Bandhu vs. Abdul Latif* (1923) 50 Cal. 258 : 27 C. W. N. 18 : 68 I. C. 439 : A. I. R. 1923 Cal. 157; *Norrison vs. Verschoyle* (1901) 6 C. W. N. 429.

6. (1912) A. C. 716 cf *Slingsby vs. District Bank Ltd.* (1932) 1 K. B. 544 (Principal not bound by agent's forgery).

the fraud was committed by the representative of a firm of solicitors. It was contended by the firm that the fraud committed was not for the benefit of the firm. On this point the remarks of Lord Macnaughten were as follows:—

“The only difference in my opinion between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on the ground that by taking the benefit he had adopted the act of his agent; he cannot approbate and reprobate.”

The reason of this principle is that the principal and the agent are one in the eye of law and therefore it is immaterial who commits the misdeed.¹

Section 238 is silent on the point of admission made by an agent, but in English law even the admission of the agent would bind the principal.² This is a special feature of the English law. A passenger had lost his article by theft and the railway Station Master reported to the police that the porter had absconded with the parcel. The admission was held to be binding on the railway.

Willes, J., remarked:—

“A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and consequently he is answerable for the wrong of the person so entrusted whether in the manner of doing such an act, or in doing such an act under circumstances in which it ought to have been done: provided that what was done was done not from any caprice of the servant, but in the course of the employment.”

The maxim “knowledge of the agent is the knowledge of the principal,” is called the doctrine of constructive or imputed notice. It is supposed that the agent would communicate the knowledge to the principal, but the information should be material to the business for which the agent is employed.³

In an English case⁴ the plaintiff got himself insured against loss of eye sight through an agent of the assurance company and the contract was that the plaintiff would get £ 500 for the total loss of eye sight and £ 250 for the

1. *Re Drabble Bros* (1930) 2 Ch. 211; *Mair vs. Rio Gande Rubber Estates* (1913) A. C. 853; *Pearson vs. Dublin Corporation* (1907) A. C. 351.

2. *Paley vs. Manchester Sheffield & Lincolnshire Railway Co.* (1872) 7 Cal. 415 at page 420.

3. *Willie vs. Pallen* (1862) 46 E. R. 767 : 142 R. R. 180.

4. *Bowden vs. London etc. assurance company* (1892) 2 . B. 534.

Does admission of the agent bind the principal?

III. Information to the agent binds the principal.

English law

loss of one eye. The agent knew that the plaintiff was one eyed man and so the plaintiff was awarded £500 on the loss of the other eye. It was held that the company was bound by the knowledge of the agent.

The Indian Law differs from the English Law in this respect that the information should come to the agent in course of business and not by chance in a casual conversation. Indian law.

The law is laid down in section 229 of the Contract Act:—

“Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal shall as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.”

The Judicial Committee observed in *Rampal Singh Vs. Balbhaddar Singh*,¹ “It is a rule of law which imputes the knowledge of the agent to the principal or in other words, the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in course of the proceedings.”

There are five conditions to which the doctrine is subject:— Essentials of the doctrine.

(i) The agent should get the information in course of business. The Judicial Committee held in *Chabildas Vs. Dayal Mowji*² that agent's knowledge obtained prior to the commencement of agency could not be imputed to the principal. The English law was also the same but the court of Exchequer held in *Dresser Vs. Norwood*³ that knowledge of the agent, however acquired, is the knowledge of the principal. The facts of the case were these: A entrusted goods to H for sale on commission and C who was previously in the employ of H knew that the goods belonged to A. He bought those goods for B as broker but did not communicate to B that the goods belonged to A. In an action by H for the price of goods B tried to set off a debt due from H to himself. It was held that C's knowledge that the goods belonged to A must be binding on B and the set off could not be allowed. The reason is that of the two innocent parties one who employed a dishonest

1. 29 I. A. 203, 212.

2. (1907) 31 Bom. 566 : 9 Bom. L. R. 1062 : 11 C. W. N. 1109 : 4 A. L. J. 750 : 17 M. L. J. 465; See also *Giniabai vs. Moti Lal* A. I. R. 1925 Nag. 398 : 89 I. C. 625; *Standard Oil Co. vs. Haridas Velji* A. I. R. 1921 Sindh 121 : 16 S. L. R. 235 : 79 I. C. 456.

3. (1864) 144 E. R. 188.

agent should suffer. This principle does not apply to constructive notice.¹

(ii) Notice to the agent will not bind the principal if the agent is guilty of fraud on the principal. The reason is that the agent will not confess his fraud to the principal. This principle was supported by the Privy Council² in a case where a solicitor practised fraud on his client in the course of a transaction. It was held that the notice to the solicitor did not operate as notice to the client.³

(iii) The agent should be under a duty to communicate the information to the principal. In the case of an insurance broker it was held that in as much as it was not his duty to communicate material facts coming to his knowledge to the principal but to the insurer, the knowledge of the broker would not be the knowledge of the principal.⁴ Similarly a policy was sought to be avoided by an underwriter on the ground of non-disclosure of material facts, and it was found that the facts had been disclosed to his solicitor who did not communicate the same to his principal. It was held that the underwriter was not bound by the knowledge of his solicitor for it was not a part of the ordinary duties of the solicitor to receive notices on behalf of his principal about mercantile transactions.⁵ A person was the secretary of two companies and he obtained certain information as secretary of one of the companies. It was held that the other company would not be bound unless the circumstances were such that it was the duty of the secretary to communicate the information obtained by him to the other company as well.⁶

(iv) The principal would be bound by the notice to his agent only from the time when the agent in the ordinary course of business would have communicated the information to his principal. An agent who had shipped certain goods knew that the goods had been lost but did not inform his principal of this fact. The principal insured

1. *Wyllie vs. Pollen* (1862) 46 E. R. 767; 142 R. R. 180.

2. *Texas Company vs. Bombay Banking Company* (1920) 44 Bom. 130; 22 Bom. L. R. 429; 24 C. W. N. 469; (1920) M. W. N. 70; 11 L. W. 320; 54 I. C. 121; *Sooleman vs. Rahimtulla* (1904) 6 Bom. L. R. 800 (Same person agent for mortgagor and mortgagee. Agent not disclosing flaw in title-mortgagee not fixed with notice); *Shiv Lal Moti Lal vs. Tricum Dass* (1912) 36 Bom. 564; 14 Bom. L. R. 45; 14 I. C. 353.

3. *Cave vs. Cave* (1880) 15 Ch. D. 639; *Williams vs. Preston* (1882) 20 Ch. D. 672.

4. *Blackburn vs. Vigars* (1817) 12 A. C. 531.

5. *Tate vs. Hyslop* (1885) 15 Q. B. D. 368.

6. *Re Fenwicke Deep Sea Fishery Co.'s claim* (1902) 1 Ch. 507.

them without any knowledge of the true facts. It was held that the insurance having been made after the time when the principal could have had information of the loss of the goods by telegram was void for non-disclosure of material facts.¹

(v) The information should be material to the purpose for which the agent was employed. A solicitor was employed to transfer a mortgage. He knew that there were subsequent encumbrances. It was held that in as much as the information about the subsequent mortgages was not material for the purpose of the transfer it did not operate as notice to the transferee.² In *Rahim Baksh Vs. Central Bank of India*³ it was held that information obtained by an agent who was a member of the pledger's firm and also that of the pledgee, was not constructive notice to the pledgee.

The principal is liable for the contracts entered into by his agent even when the agent does not disclose the principal. The third party on discovering the principal can sue the principal. Lord Blackburn in *Arm Strong Vs. Stokes*⁴ observed. "It is, we think, too firmly established to be now questioned, that, where a person employs another to make contract of purchase, he, as principal is liable to the seller, though the seller never heard of his existence and entered into the contract solely on the credit of the person whom he believed to be the principal, though in fact he was not."

IV. Even undisclosed principal liable for the contracts of the agent.

Principal is responsible even when the agent is personally liable.

V. Liability of the principal even when the agent is liable.

Section 233 and 234 of the Contract Act lay down this principle.

Section 233:—

"In cases where the agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable."

Indian law.

Section 234:—

"When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that agent only will be held liable, he cannot afterwards, hold liable the agent or the principal respectively."

1. *Proud foot vs. Montifiore* (1867) 2 Q. B. 511.
2. *Willie vs. Pollen* (1863) 32 L. J. Ch. 782; *Wilde vs. Gibson* (1848) 9 E. R. 897 : 73 R. R. 191.
3. (1929) 56 Cal. 367 : A. I. R. 1929 Cal. 497 : 119 I. C. 23.
4. (1872) L. R. 7 Q. B. 598.

Money borrowed by the liquidator of a company under authority can be recovered from the company.¹ Similar is the case of the advances made to the agent of a company duly authorized to borrow.²

English law

Under the English law, however, the liability of the agent and the principal is alternative. The third party can hold either the agent or the principal liable but not both.

In *Thompson Vs. Davenport*³ Lord Tenterden said:—

“If at the time of sale the seller knows not only that the person who is dealing with him is not principal, but agent, and also knows who is the principal, and notwithstanding all that knowledge chooses to make the agent his debtor, dealing with him and him alone, then, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he has the power of choosing between one and the other.”

In *Kendall Vs. Hamilton*⁴ Earl Cairns said:—

“Now, I take it to be clear that, where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal; but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even though the judgment does not result in satisfaction of the debt.”

The Indian courts too seem to turn round to the English view and interpret sec. 233 as providing an alternative remedy only. In *Kutti Krishnan Vs. Appa Nair*,⁵ Coutts Trotter, C. J., held that a third person may sue both principal and agent alternatively, if he is not sure as to which of them is liable, but he cannot sue them jointly. In a Bombay case⁶ a person was liable as a party to a negotiable instrument. In a suit against him the plaintiff was not allowed to show that another person was liable and that the signatory acted only for an undisclosed principal.

1. In *Re Ganges Steam Tug Co.* (1891) 18 Cal. 31.

2. *Purna Nand vs. Gormack* (1881) 6 Bom. 326.

3. (1829) 109 E. R. 30 : 32 R. R. 578.

4. (1879) 4 A. C. 504 at page 514, also see *Callins vs. Associated Greyhound race courses Ltd.* (1930) 1 Ch. 1.

5. (1926) 49 Mad. 900 : 97 I. C. 475 : 24 L. W. 451 : (1926) M. W. N. 729; A. I. R. 1926 Mad. 1213 : 51 M. L. J. 311; see also *Lachhman vs. Bhagirath* A. I. R. 1926 Oudh 41 : 90 I. C. 487; *Ananth Chari vs. Rathnam & Sarathy* (1923) 18 L. W. 674 : 75 I. C. 161 : A. I. R. 1923 Mad. 713 : 45 M. L. J. 83; *Pattinson vs. Bindhya* (1933) 12 Pat. 216 : 146 I. C. 56 : A. I. R. 1933 Pat. 196; *Raghunath Jha vs. Kisori Lal* A. I. R. 1934 Pat. 269 (In cases of doubt both should be made defendants and if the principal is not liable, agent should be sued for breach of warranty of authority).

6. *Sita Ram vs. Chimman Lal* (1928) 52 Bom. 640 : 30 Bom. L. R. 1300 A. I. R. 1928 Bom. 516 : 115 I. C. 400.

Where an agent enters into contract with a third party acting for an undisclosed principal, the principal can only claim the benefit of the contract subject to the equities which might exist between the agent and the third party.

VI. Principal's claim is subject to the equities existing between the agent and the third party.

This is provided by sections 231 and 232 of the Contract Act.

Section 231 runs as follows:—

“If an agent makes a contract with a person who neither knows nor has reason to suspect that he is an agent, his principal may require the performance of the contract, but the other contracting party has, as against the principal, the same rights as he would have had as against the agent, if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.”

Section 232:—

“Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.”

In *Laxmi Das Narain Das Vs. Anna R. Lane*¹ where A entered into a contract for sale of property with B believing him to be the principal, but subsequently on discovering that B was only acting as agent for C to whom he was not willing to sell the property refused to convey the property to B it was held that the section would not be applicable since the alleged principal C had not intervened and so A was bound by his contract with B. The section applies only when the principal himself intervenes.

As to what is “disclosure” within the meaning of section 231 it has been held that a principal cannot be said to disclose himself if the other party gets knowledge about him not from the principal himself but from some other source.²

Meaning of disclosure in sec. 231

This provision is very important in arhat dealings. The principal residing in another city the kachcha arhatia often fraudulently takes advantage of fluctuation in prices on the spot. The principal though not privy to the contract can claim the benefit of the contract by disclosing himself.

1. (1904) 32 Bom. 356 : 6 Bom. L. R. 731.

2. *Kapurji Magin Ram vs. Pannoji Devi Chand* (1929) 53 Bom. 110 : 30 Bom. L. R. 1560 : 113 I. C. 341 : A. I. R. 1929 Bom. 177; *Laxmandas vs. Lane* (1904) 32 Bom. 356 : 6 Bom. L. R. 731; *P. P. Deo vs. Narain A. I. R.* 1929 Nag. 170 : 116 I. C. 669.

G. N. D.

Advocate High Court

Jammu & Kashmir

Srinagar.

Liability of the arhatia to third parties.

I. Personal liability.

As said above a pakka arhatia deals as principal to principal and he is always personally liable to the third parties. The same is the liability of a kachcha arhatia. He stands in the position of an agent acting for undisclosed principal. There are, however, circumstances under which every agent might be personally liable for any contract brought about by him.

(i) Where personal liability of the agent is provided by the contract:—

Lord Denman, C. J., said¹:—

“A party who executes an instrument in the name of another, whose name he puts to the instrument and adds his own name as agent for that other, cannot be treated as a party to that instrument and be sued upon it unless it was shown that he was the real principal.”

It has been held in case of a negotiable instrument that where a person signs without making it clear that he is signing it only as agent, even though he may be described in the body as the agent, still he would be liable personally in the matter of the note.²

The same is provided in section 28 of the Indian Negotiable Instruments Act:—

“An agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent for that he does not intend thereby to incur personal responsibility, is liable personally on the instrument except to those who induced him to sign upon the belief that the principal only would be held liable.”

This section is based on the dictum of Lord Ellenborough in *Leadbitter Vs. Forrow*.³

(ii) Section 230 of the Indian Contract Act provides three cases in which the agent would be personally liable. It reads as follows:—

“In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such contracts shall be presumed to exist in the following cases:—

(a) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad.

1. *Jenkins vs. Hutchinson* (1849) 116 E. R. 1448: 78 R. R. 500.

2. *Kettle vs. Dunster* (1927) 138 L. T. 158; *Elliat vs. Bax Iron Side* (1925) 2 K. B. 301; see also *Hutchison vs. Eaton* (1884) 13 Q. B. D. 861, *Universal Steam Navigation Company vs. James*, (1923) A. C. 492.

3. (1816) 5 M & S 345, 349; *The Elinville* (1904) p 319; *T. M. Pigon vs. Ram Krishna* 2 W. R. 301.

(b) Where the agent does not disclose the name of his principal.

(c) Where the principal though disclosed cannot be sued."

Clause (a). It is based on the principle in *Smyth Vs. Anderson*.¹

Maule, J., observed:—

"It is well known in ordinary cases, where a merchant resident abroad buys goods here through an agent, that the seller contracts with the agent and there is no privity of contract between him and the foreign principal."

The principal in such cases cannot be sued but the presumption may be rebutted by showing that the foreign principal was the actual contracting party and the contract was in his name. An English company which was working in England set up sugar refinery business in India. An agent of the company entered into contract in the name of the company. It was held that though the company was resident abroad the contract was with the company and the agent could not be liable." In another case² the plaintiff entered into service of a foreign railway through their agents. The plaintiff was wrongfully dismissed. The plaintiff sued the agents. It was held that they were not liable as the contract was with the foreign railway company.

Clause (b). In cases of undisclosed principal the liability of the agent is based on the principle that the other party to the contract has to rely only on the credit of the agent. A suitable example is that of company promoters who enter into contracts on behalf of the company which does not really exist. The promoters are personally liable.³ This rule is subject to the condition that the other party to the contract should be unaware that the agent was acting only in the capacity of an agent.⁴ The price of goods supplied to the secretary of a club can not be recovered from him personally.⁵ In a joint family business if the managing partner contracts in his own name he may enforce it as agent of undisclosed principal.

1. (1849) 137 E. R. 9 : 18 L. J. C. P. 109.

2. (1903) *Tutika Basavaraju vs. Parry & Co.* 27 Mad. 315.

3. *Ganpat vs. Forbis* A. I. R. 1930 Bom. 569 : 32 Bom. L. R. 1336 · 128 I. C. 550.

4. *Kilver vs. Baxter* (1866) 2 C. P. 174; *Laxmi Shanker vs. Moti Ram* (1904) 6 Bom. L. R. 1106.

5. *Mackimon vs. Lang* (1881) 5 Bom. 584; *Lyallpur Sugar Co. vs. Mul Raj* (1924) 65 I. C. 473 (Lah.).

6. *N. W. P. Club vs. Sadullah* (1898) 20 All. 497 : (1898) A. W. N. 136.

In a suit by him the junior members of the family need not be made parties.¹

Clause (c). The liability of the agent also exists when the principal cannot be sued *e. g.* if the principal is a foreign sovereign or ambassador.² In such cases the principal is disclosed but all the same the liability of the agent is there. The public servants are not personally liable as agents of the Government under section 230 for two reasons.

(1) The contract is made upon the credit of the Government, and

(2) It is in the interest of maintaining the efficiency of the service to keep them immune from fear of personal liability.³

(iii) Money paid to agent under mistake or fraud by third party.

If the agent receives payment from a third party under mistake or fraud, the agent is personally liable.⁴ The liability comes to an end when the money is paid over to the principal.⁵ Conversely if the agent pays money on behalf of his principal on account of mistake or fraud he can himself recover the amount from the principal.⁶

(iv) Where the agent has a personal interest in the subject matter of the contract. In such cases the agent is personally responsible for the contract.⁷

(v) The agent may also be personally liable according to custom or trade usage *e. g.* factors, auctioneers and policy brokers.

II. Liability for
breach of
warranty.

The law is laid down in section 235 of the Contract Act which runs as follows:—

“A person untruly representing himself to be the authorized agent of another and thereby inducing a third person to

1. Gopal Das vs. Badri Nath (1904) 27 All. 361 : 2 A. L. J. 3: (1904) A. W. N. 282.

2. Ram Chand vs. Ismil Khan A. I. R. 1928 Sindh 189: 113 I. C. 345; Abdul Ali vs. Gold Stein (1910) 4 I. C. 902; Raghbir Dayal vs. Firm of Pyare Lal A. I. R. 1933 Lah. 93 : 145 I. C. 178; Mallhu vs. Megh Raj (1920) 55 I. C. 992 (Lah.).

3. Secretary of State vs. Sulamanji (1902) 26 Bom. 801 : 4 Bom. L. R. 706.

4. Taylor vs. Metropolitan Rail Company (1906) 2 K. B. 55.

5. Pollard vs. Bank of England (1871) 6. Q. B. 623.

6. Colonial Bank vs. Exchange Bank (1885) 11 A. C. 84; Halt vs. Ely (1853) 118 E. R. 634 : 93 R. R. 398.

7. Subra Mania vs. Narayan (1901) 24 Mad. 130; Durga Prasad vs. Cawnpore Flour Mills A. I. R. 1929 Oudh 417 : 6 O. W. N. 599.

deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing."

This section is based on the leading case *Collen Vs. Wright*.¹ Wright was the land agent of Gardner and as such made an agreement with the plaintiff for a lease to him for 12½ years of a farm of Gardners. Gardner repudiated the contract as Wright had no authority to enter into such a long contract. Plaintiff sued for damages. Held that as Wright had represented that an authority vested in him so he was responsible for all loss accruing from the fact that the representation was false. It is immaterial even if the representation should be innocent.

Willes, J., in that case remarked:—

"A person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damage which he may sustain by reason of the assertion of authority being untrue. The obligation arising in such a case is well expressed by saying that a person professing to contract as agent of another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professed to have does in point of fact exist."

The ingredients of the above section are as follows:—

Ingredients of
Sec. 285.

(1) The agent must be guilty of untrue representation of fact. Ignorance of law cannot be pleaded and so no liability can be imposed for misrepresentation of law. In a case² the defendant represented himself to be the duly authorised agent of another who in fact was minor. A minor cannot appoint an agent and so the agent was held to be guilty of misrepresentation of fact. A broker entered into a contract due to a wrong telegram. The mistake was on the part of telegraph authorities but the broker was held personally liable because misrepresentation to the other party had actually resulted.³

This section covers both the cases, namely the total absence of authority as well as misrepresentation about the extent of authority. An agent untruly represented that he was authorised to sell a plot of land at a particular price. He was held personally liable.⁴ An agent acting

1. (1857) 120 E. R. 241 : 110 R. R. 611; 8 E. & B. 647 *Starkey vs. Bank of England* (1903) A. C. 114 (agent's belief in the existence of authority is immaterial).

2. *Mani bhai vs. Rupaliba* (1900) 24 Bom. 166 : 1 Bom. L. R. 646.

3. *Haji Ismail Sait vs. James Short* (1910) 8 M. L. T. 383.

4. *Ganpat vs. Sarju* (1911) 34 All. 168 : 9 A. L. J. 8 : 13 I. C. 94.

under good faith cannot be exempt from liability resulting from misrepresentation.¹

(2) The third party should have been induced to enter into contract on account of such misrepresentation. It is essential that the third party should have been misled. If he himself knows that the representation is false, the agent would not be liable. Where a third party knew that the alleged principal of an agent was minor, he could not have been misled about the authority of the agent for the minor could confer no authority and the agent would not be liable.² There are also certain type of known agents *e. g.* solicitor, barrister, director of a company etc. In such cases no question of implied warranty arises³ unless the agent is guilty of fraud.⁴

(3) The principal must have disowned the act of the agent.

(4) Loss should have been suffered by the third party on account of the misrepresentation.

Benefit to the principal.

There is one exception to the rule stated above. If the principal has been benefitted the liability of the agent would be diminished to the extent of the benefit derived by the principal. An agent without any authority borrowed money for his principal and the money was used for paying off the debts of the principal. It was held that the principal was liable to the extent of money used for his benefit but no more.⁵

Measure of damages.

The party suffering loss is entitled to recover actual damages from the agent. An agent without authority bought goods for his principal which he did not ratify. The seller was entitled to the difference between the market value⁶ and the contract rate. The cost of proceedings can also be recovered from the agent.⁷ The loss to be recovered should be the actual loss and not the anticipated profit.⁸

1. *Starkey vs. Bank of England* (1903) A. C. 114; *Oliver vs. Bank of England* (1902) 1 Ch. 610 (cf) *Younge vs. Toymbee* (1910) 1 K. B. 215; *Simmons vs. Liberal opinion Ltd.* (1911) 1 K. B. 966 (authority which had ceased without the agent's knowledge).

2. *Manibhai vs. Rupaliba* (1899) 24 Bom. 166 : 1 Bom. L. R. 646.

3. *Halbot vs. Lens* (1901) 1 Ch. 344.

4. *Dimu vs. Macdonald* (1897) 1 Q. B. 555.

5. *Kasam vs. Narain* A. I. R. 1930 Nag. 42 : 122 I. C. 444; *Reid vs. Righby* (1894) 2 Q. B. 40.

6. *Simons vs. Patchett* (1857) 119 E. R. 1357 : 110 R. R. 730.

7. *Hagbi vs. Gracine* (1864) 33 L. J. Q. B. 335 : 144 R. R. 747.

8. *Hasanbhoy vs. Clapham* (1905) A. C. 302.

Agent acting for himself has no right to enforce performance of the contract. Under the English law an agent acting for a named or known principal but really acting for himself cannot enforce the contract¹ but where the principal is undisclosed the agent can enforce the performance of the contract subject to the equities of other parties.²

III. Agent acting for himself cannot enforce performance.

Indian Contract Act ignores this difference and the rule is laid in section 236:—

“A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting not as agent, but on his own account.”

The section applies where the agent is acting for a named principal.³ Where the agent is acting for an undisclosed principal but it is subsequently revealed that the agent is acting on his own account the provisions of the section come immediately into operation.⁴ The Calcutta High Court is of this view and the Madras High Court⁵ supports the Calcutta High Court.

It should be noted that this provision applies only to an ordinary agent. The pakka arhatia while selling his own goods or himself buying the goods of his principal can claim the benefit of the contract by special usage of the country. The kachcha arhatia is fully governed by this section.

Pakka arhatia and wagering contract.

The plea of wagering contracts cannot be raised between principal and a kachcha arhatia for the kachcha arhatia occupies the position of an ordinary agent with respect to his principal as well as to third party. The pakka arhatia's case is different. He, though occupying a middle position, is in the capacity of a principal as far as the performance of the contract is concerned. Thus his rights and duties, regarding his own constituent or a third party are determined as principal to principal. The rights and duties of a pakka arhatia enumerated above apply

1. Beckerton vs. Burrell (1816) 105 E. R. 1901.

2. Harper vs. Vigor Bros (1909) 2 K. B. 549 (cf) Brandt vs. Morris (1917) 2 K. B. 784.

3. Nandlal vs. Gurupad (1924) 51 Cal. 588 : A. I. R. 1924 Cal. 733 : 81 I. C. 721; Sewdatt vs. Nahapiet (1907) 34 Cal. 628 : 11 C. W. N. 609.

4. Ramji Das vs. Jaubidas (1912) 39 Cal. 802 : 18 C. W. N. 263 : 17 I. C. 973; Ramdas vs. Kadan Mal A. I. R. 1933 Sindh 207.

5. Kata Chinna Lakshmiah vs. Nalam Vishwa Natham (1917) 42 I. C. 357 (Mad.).

only to genuine and valid transactions. Where, however, a transaction is illegal and is in the nature of a wager, it cannot be enforced. The pakka arhatia can claim no right in respect of those transactions and is also absolved from corresponding duties to which he is subject. The effect of wagering contract on a pakka arhatia has been discussed in a number of cases. From those rulings the following principles may be deduced:—

1. No plea of wager can be raised between principal and agent¹ unless the case can come within the Bombay Gambling Act No. 3 of 1865.

2. Whether a transaction is wagering or not must be determined after taking into account all the surrounding circumstances and the real nature of the contract.²

Among the surrounding circumstances are included the intention of the parties, the capacity of the parties to give and take delivery, their general course of dealing and the different parts which go to make up the complete transaction. Where pakka arhatia accepts the order of his constituent and in order to carry it out enters into a covering contract with third parties, a difficult question arises as to whether the nature of the covering contract is relevant circumstance to determine whether the transaction between the arhatia and the constituent is of a wagering nature. Opinion is greatly divided on this point. In some cases³ it has been held that in as much as the relationship between the pakka arhatia and the constituent is that of a buyer and a seller, the nature of the contract between the pakka arhatia and his constituent should be determined with reference to the nature of that transaction alone and the nature of the covering contract is irrelevant for the enquiry. On the contrary in other cases⁴ it has been held that the nature of the covering contract is a piece of evidence although not a conclusive piece of evidence. The reason is that the covering contract throws light as to the

1. Manni Lal vs. Radha Kishan (1920) 45 Bom. 386 : 22 Bom. L. R. 1018; A. I. R. 1926 P. C. 119 : 23 All. 155 : 25 A. L. J. 736.

2. Vithalsa Narayansa vs. H. H. Raoji Bhoy A. I. R. 1934 Nag. 129 : 151 I. C. 63.

3. Manni Lal vs. Radha Kishan (1920) 45 Bom. 386; Mukand Chand vs. Sobhag Mal (1924) 26 Bom. L. R. 1097 at 1104; Chhog Mal Bal Kishan Das vs. Jainarain Kanhaiya Lal (1913) 15 Bom. L. R. 716 : (1915) 38 Bom. 204 : 20 I. C. 834.

4. Moti Chand Magan Das vs. Keshav Appaji (1920) 22 Bom. L. R. 406, Har Nand Rai vs. Kanhaiya Lal unreported decision Bombay High Court Appeal No. 23 of 1924, suit No. 3348 of 1920, Bhagwan Das vs. Barjurji (1917) 42 Bom. 373; Mukand Chand vs. Sobhag Mal 1925 Bom. 79.

real intention of the pakka arhatia and his constituent. A third class of cases¹ has gone so far as to say that even where the covering contract with the third party is proved to be not genuine or where no contract with the third party is proved the transaction between the pakka arhatia and his constituent cannot be wager unless specifically proved.

3. In every contract it must be proved as a matter of fact that the common intention of the parties was to deal only in differences and to gamble on the rise and fall of the market.²

4. A speculative contract is not necessarily a wagering transaction.³

5. Where the very existence of the contract is denied by a party the defence of wager is not open to him.⁴

6. In a wagering contract if there is an arbitration clause in the contract it cannot be enforced and any award given on its basis is invalid.⁵

From the principles enumerated above it seems that not only the nature of the contract between the plaintiff and the pakka arhatia should be looked into but even the covering contract and the surrounding circumstances should also be taken into consideration for nobody can be expected to declare his common intention in a contract signed, sealed and delivered. It is for the court to enquire into the real nature of the transaction in every case.

Validity of the custom of pakka arhatia.

The essential characteristics of a mercantile custom are:—

- (1) Its general acceptance,
- (2) Its reasonable nature,
- (3) Certainty and uniformity.

I. Custom as a rule should be proved in every case until it eventually becomes so well known that the

1. Har Narain vs. Radha Kishan A. I. R. 1923 Nag. 324; Devsi Harpal vs. Bhikham Chand (1927) 29 Bom. L. R. 147.

2. Vithasa vs. H. H. Raoji Bhoy A. I. R. 1934 Nag. 129; Karuna Kumar vs. Lankaram A. I. R. 1933 Cal. 759; Bhagwan Das vs. Burjorji 16 A. L. J. 241 P. C; Sukhdeo Das vs. Govindass A. I. R. 1924 Mad. 378: 26 A. L. J. 484 P. C.

3. Vithalsa Narayansa vs. H. H. Raoji A. I. R. 1934 Nag. 129; Sukhdeo Das vs. Govindass A. I. R. 1928 P. C. 30; Jiwan Chand vs. Laxmi Narrain A. I. R. 1925 Bom. 511.

4. Joharmal vs. Chet Ram 28 I. C. 538.

5. Karuna Kumar vs. Lankaram A. I. R. 1933 Cal 759.

courts take judicial notice of it. It should be so universally acquiesced in that every body engaged in the trade knows of it or might know if he took the pains to enquire.¹ As regards the amount of evidence needed to prove the usage it depends on which stage the custom is. There is the primary stage when the custom has to be proved definitely and to the hilt. In the secondary stage courts become so familiar with the custom that only slight evidence is needed to establish it and lastly it reaches the stage when courts take judicial notice of it and no evidence is needed.² The custom of a pakka arhatia is some where between the second and the third stage. It is known from big cities down to small towns. The question in the presidency towns has risen again and again about the nature and incidents of this usage.³ The usage has been held widely prevalent by Nagpur,⁴ Sindh,⁵ Lahore,⁶ and Allahabad⁷ Courts.

It was also found prevalent in Hapur,⁸ Ghaziabad⁹ Shamli,¹⁰ Shahjahanpur¹¹ and Cawnpore.¹² It was remarked by the Lahore High Court that pakka arhat dealings are well established as legitimate mode of conducting commercial business.¹³ The Bombay High Court has gone ahead of all others in recognising this custom. The question was enquired into by the Banking Enquiry Committee 1929-30 and it remarked as follows on page 60:—

“The pakka arhatia is common every where; most large whole-sale firms have representatives of the kind in all principal distributing centres. Nor are their functions confined to buying and selling. It is they, for instance, who keep their constituents informed of fluctuation of prices. In other trades than grain they never buy on their own account. But the grain arhatia does, or possibly it would be more correct to say that the same man is

1. *Plaice vs. All Corek* (1866) 4 F. & F. 1074 *Bettany vs. Eastern Morning & Hulltars Co. Ltd.* 1900 T. L. R. 401.

2. *Moilt vs. Halliday* (1898) I. Q. B. 1925.

3. *Bhagwan Das vs. Burjorji* 19 I. C. 29 (Bombay); *Devshi Harpal vs. Bhikam Chand* A. I. R. 1927 Bom. 125; *Bahasa Bakale vs. Hombanna* A. I. R. 1932 Bom. 593; *Karuna Kumar vs. Lanka Ram* 1933 A. I. R. Cal. 759.

4. *Har Narain vs. Radha Kishan* 75 I. C. 906 : A. I. R. 1923 Nag. 324.

5. *Firm Rameshwar Das Benarsi Dass vs. Firm Tansukh Rai* A. I. R. 1927 Sindh 125; *Raghunath vs. Ram Pratap* A. I. R. 1935 Sindh 38 : 160 I. C. 6.

6. *Jot Ram vs. Jiwan Ram* A. I. R. 1932 Lahore 633.

7. *Megh Raj vs. Anup Singh* A. I. R. 1935 All. 1004.

8. *Kishori Lal vs. Jiwan Lal* A. I. R. 1923 All. 242.

9. *Megh Raj vs. Anup Singh* A. I. R. 1935 All. 1004.

10. *Jot Ram vs. Jiwan Ram* A. I. R. 1932 Lahore 633.

11. and 12. *Champa Ram vs. Tulsi Ram* A. I. R. 1927 All. 617.

13. *Jot Ram vs. Jiwan Ram* A. I. R. 1932 Lahore 633.

often both dealer on his own account and agent of some foreign firm."

Thus there can be no doubt that the usage is universally acquiesced in.

II. The chief controversy has been about the reasonability of this custom. In Bombay presidency it had received its recognition long ago. In a case¹ it was held that the defendant knew of the custom which was not unreasonable as it did not involve a conflict between the pakka arhatia's interest and duty. It is possible to speak of a person as "an agent upto a certain point" as was remarked by Mellish L. J.² The pakka arhatia's duties are those of an ordinary agent but he possesses higher rights of a principal in certain respects. This point came up before Lahore High Court for discussion.³ Their Lordships remarked:—

"It is not opposed to public policy and is not void under section 23 of the Contract Act. It is for the parties to decide on what terms contracts should be entered into and if they choose to enter into contracts with full knowledge of the commercial usage governing them there is no reason why they should not be held to be bound thereby, even if the usage does involve some conflict between agent's duty and interest."

As against this forcible pronouncement the court in Sindh threw a lot of doubt about the reasonability of the custom.⁴

It was remarked:—

"The word 'pakki arhat' has no magical efficacy. They are no more than a compendious description of a body of local usages which vary from market to market. Anybody setting up the local usage must allege and prove the incidents of that usage. An agent who while acting as agent himself deals as a principal without the knowledge of the other party is acting contrary to the spirit of sections 211 to 214 Contract Act. If there be a question upon whom the burden of proof lies, it must lie on the pakka arhatia that the transaction is not disadvantageous to the principal. A transaction which necessarily puts the agent's duty in conflict with the interest of the principal must be presumed to be disadvantageous to the principal who is not informed of the fact."

In this case, however, it was not proved that the defendant knew that he was doing business with the plaintiff on the system of pakka arhat. It is also to be noted that this ruling is at variance with a long chain of authorities

1. Bhagwan Dass vs. Kanji 30 Bom. 205.

2. Ex parte White (1870-71) L. R. 6 Ch. 397 at page 403.

3. Jot Ram vs. Jiwan Ram A. I. R. 1932 Lahore 633.

4. Raghu Nath vs. Ram Pratap A. I. R. 1935. Sindh 38; 29 All. 730 (relied on.)

where it had been held that the relationship between a pakka arhatia and his principal is that of principal to principal except in certain respects in which he partakes the nature of an agent. The Allahabad High Court¹ had gone one step further than the Sindh Court. It was held that the custom of pakka arhat was unreasonable and immoral in the sense that it is likely to lead to gross frauds and in any event puts the agent in double capacity in which his duty and interest must necessarily conflict and is contrary to the general principles of agency and therefore is highly unreasonable. This view, however, was dissented from in another case² by the same High Court. It is instructive to read the remarks of Thom (Now Sir Thom) and Iqbal Ahmad JJ:—

“In the case of transactions entered into on the pakka arhat system a custom or usage that entitled a commission agent to protect himself from loss in the event of the failure of the contracting party to ensure him against loss is not either unreasonable or immoral. There is a direct contractual relationship between the pakka arhatia and the purchaser and the seller, and he, as principal, is liable to both for the performance of the contract. The failure of the purchaser who has entered into a forward contract for the purchase of some commodity through a pakka arhatia, to take delivery on due date, does not exonerate the arhatia from liability to take delivery from the seller in pursuance of the forward contract. It follows that a pakka arhatia is himself vitally interested in the performance of the contract that has been entered into through him and a custom that provides means to ensure the arhatia against prospective loss cannot be characterized as unreasonable and immoral. On the contrary such a custom is calculated to check reckless speculation and to promote fair dealings and transaction of business on honest lines and as such is reasonable and salutary.”

In the face of these observations I should reasonably presume that no conflict of views is likely to arise in future. It is now in a line with the view held by the Bombay, Lahore and Calcutta High Courts. Even in England the *del credere* agency which is analogous to pakka arhat has been recognised and his position has been universally accepted. The *del credere* agency being so popular in England it is hard to say why the usage of pakka arhat should not be recognized in India. In fact it has reached a stage where either the nature, rights, and liabilities of an arhatia should be defined by the legislature or it should receive judicial notice by the courts.

1. Kishori Lal vs. Jiwan Lal A. I. R. 1933 All. 242.

2. Megh Raj vs. Anup Singh A. I. R. 1935 All. 1004; Champa Ram vs. Firm Tulsi Ram Jai Lal A. I. R. 1927 All. 617.

III. Certainty and Uniformity.

Although the reported cases about the rights and liabilities of a pakka arhatia are not very large but in the commercial circles the word arhatia has a very definite connotation. It is hardly correct that the custom varies in various markets. It is one throughout the country.

It is almost certain that with the growth of speculation and export trade in India the custom of pakka arhat is being firmly rooted than being discarded. The old doubts have been cast away. The pakki arhat shops are flourishing not only in Bombay, Calcutta, Cawnpore etc. but have been started even in petty mufassil towns e. g. Hapur, Shamli, Sikanderabad, Ghaziabad, Chandausi Hathras and other places in U. P. The rights and duties of such arhatias are provided by the rules of the chambers of commerce spread through-out India and the peculiarity is that they are almost uniform and certain.

Thus it will be seen that the custom of pakki arhat fulfils all the necessary requirements of a commercial custom. The practice is so fixed in business circles that the incidents of this custom are rarely disputed in a court of law. Probably this accounts for the existence of only a small number of rulings on the subject. The custom has prevailed in India for a very long time and all over the country but it is only when the legal genius tried to get over the custom that it came up before the High Courts. It cannot be said that the custom is not fully understood or there are doubts about it among the business men themselves.

Burden of proof of the usage of pakka arhatia.

The Sindh court in a recent case¹ held that the word pakka arhat represents a compendious description of a body of local usages which vary from market to market. It is a material departure from the ordinary relation of principal and agent and therefore the custom of pakka arhatia must be proved by the party pleading it. In Chandu Lal Vs. Siddhant Rai² the custom was not proved and the usage failed because of the absence of necessary evidence. The result was that ample mass of evidence was produced in Bhagwan Dass Vs. Kanji³ and the incidents of pakka arhatia

1. Raghunath vs. Ram Pratap Ram Chandra A. I. R. 1935 Sindh 38: 160 I. C. 6.

2. (1905) 29 Bom. 291 : 7 Bom. L. R. 165.

3. (1905) 30 Bom. 205 : 7 Bom. L. R. 611.

were held to be proved and laid down in all details. It seems that the Sindh ruling goes too far. It should be enough to mention in the pleadings that the agent is carrying on business on pakka arhat system. The incidents are well known and the pakki arhat dealings are well established in commercial circles as has been held in a number of rulings¹. Pakki arhat has come to have a definite connotation and it is useless to produce evidence to prove its incidents. The business dealings have reached a stage where the incidents of a pakka arhatia must be taken judicial notice of. Of course the person assuming the position of a pakka arhatia must prove that he was a pakka arhatia and the other party knew of it.

1. Bhagwan Das vs. Burjorji (1917) 20 Bom. L. R. 561 ; 42 Bom. 373 : 45 I. A. 29 P. C; Jot Ram vs. Jiwan Ram A. I. R. 1932 Lah. 633 : 33 Pun. L. R. 985; Bhagwan Das vs. Kanji (1905) 30 Bom. 205 (the contracts about pakka arhatia have been held in the above cases to be well established and there was nothing illegal or immoral about them).

CHAPTER III.

DEALINGS IN FUTURE.

The arhatia is essentially a middle man and the modes of business undertaken by him are of many kinds. The dealings of a pakka arhatia are much more complicated than that of a kachcha arhatia. The business done in this way can be classified into three heads:—

Kinds of transactions.

(1) Transaction in ready goods.

This does not afford any difficulty for it is a pure purchase and sale transaction.

(2) Speculation in futures.

This is a purchase or sale not of ready goods but goods to be delivered on a certain date in future. The constituent in such a transaction has to take advantage of the professional experience of the arhatia and his knowledge of working of the various market centres as well as the storage and prospect of supply and demand. Speculation is very much rife in wheat, cotton, silver, gold, stock exchange, oil seeds and shellac.

(3) Contract in options.

This is known in this country as Teji, Mandi, or Teji-Mandi transaction. This is also a kind of speculation but it minimizes the element of risk to be borne by the constituent.

(1) The operator can enter into transactions for any commodity even though he has no cash in hand, only if he expects to be in funds shortly.

Advantages of Speculation.

(2) It distributes the element of risk over a period of time. The operator is sure to find goods in future at the contractual price irrespective of the fluctuation of the market against him.

(3) The price of ready goods is determined by the present supply and demand of that commodity. Speculators enter into contracts in future forecasting the probable future supply and demand. In a speculative market the prices are determined not only by the present supply and demand but also in conjunction with the future supply and demand. The result is that it has the effect of making the prices steady over a long range of time. It tends to lessen the fluctuations in the prices. The purchaser is sure

that he would get his commodity at the present price on a future date irrespective of any disturbing factor which might take place at the time fixed for its delivery.

(4) In every forward contract the obligation to give and take actual delivery of the stipulated goods is implied and that actual deliveries are also demanded and given. Therefore, it is on the basis of large stocks only that large speculative transactions can be indulged in. The strength of a speculator depends on the amount of stock that he holds and consequently speculative dealings both encourage and necessitate the keeping of large stocks.

The beneficial effects of speculation are subject to the following provisos:—

(1) The forecasts of the future supply and demand should be accurate and the speculators should possess the business experience and keen foresight to pre-shadow the conditions of the future.

(2) There should be no misrepresentation or tampering with the market. The purchasers and sellers are not always guided by the result of the forecasts. For instance, the wheat prices in India are determined by the Liverpool and Chicago markets. If in the Liverpool market the wheat prices rise, say by one anna per maund the purchasers get over-optimistic and indulge recklessly in large purchase transactions in the hope of getting larger profits with the result that the market in India is thrown up by three or four annas. Similarly a slight fall in foreign markets tends to bring down the Indian markets much more due to over-pessimism. The effect is that Indian markets are more unsteady than those of foreign countries.

It also sometimes happens that a big speculator takes undue advantage of amateur dealers. The amateur indulges in larger transactions than he can actually buy or sell. The monied speculator on the due date either demands delivery of more commodity than is actually in stock or offers delivery of more goods than the amateur can afford to buy. Thus the small dealer is forced to make settlement at unfavourable prices. Not only this but sometimes a big speculator would buy up all the available stock in a local market and then demand further delivery from the sellers and thus would artificially force the market up. These are the unhealthy modes of speculative dealings.

The transactions of ready goods are always genuine,

but the future contracts are sometimes real and sometimes wagering. It is essential to discuss the nature of wagering contract before applying the test to many kinds of dealings in future.

Wagering contract has been defined in *Hampden Vs. Walsh*¹ as a contract by A to pay money to B on the happening of a given event in consideration of B's promise to pay money to A on the event not happening.

Wagering contract.

Cotton, L. J., defined it as follows:²—

“The essence of betting and wagering is that one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature i. e. if the future event turns out one way A will lose, but if it turns out the other way he will win.”

Hawkins, J., says:³—

“It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event and therefore remaining uncertain until that issue is known. If either of the parties may win, but cannot lose or may lose but cannot win, it is not a wagering contract.”

Birdwood, J., said in *Daya Bhai Vs. Laxmi chand*:⁴—

“If one of the parties has the event in his own hands, the transaction lacks an essential ingredient of wager.”

Jenkins, C. J., said:⁵—

It is of the essence of a wager that each party should stand to win or lose according to the uncertain or unascertained event in reference to which the chance or risk is taken.”

That is to say it must be the intention of both the parties to wager.⁶ Thus there are three essentials of wager:—

(1) It must be a promise to pay money or some thing which has a money value.

(2) The promise must be conditional on an event happening.

(3) The event must be uncertain i. e. it is to happen in future and nobody knows if it will happen or not and if it happens at all the parties are uncertain of its result.

1. (1876) 1 Q. B. D. 189.

2. *Thacker vs. Hardy* (1878) 4 Q. R. D. 685.

3. *Carlill vs. Carbolic Smoke Ball Co.* (1892) 2 Q. B. D. 484 (491).

4. (1885) 9 Bom. 358.

5. *Sassoon vs. Tokersey* (1904) 28 Bom. 616.

6. *Karuna Kumar vs. Lanka Ram* (1933) 60 Cal. 856; A. I. R. 1933 Cal. 759. See *Tod vs. Laxmi Dass* (1892) 16 Bom. 441; *Perosa vs. Maneckji* (1898) 22 Bom. 899 *Ajodhya vs. Lalman* (1902) 25 All. 38; *Eshoor Dass vs. Venkata Sabha Rao* (1895) 18 Mad. 306.

English law of
wagering con-
tract.

There is a difference between English and Indian law of wager. In England wagering transactions are divided into two classes *i. e.* games for sports and games for other purposes. Games for sports are declared illegal by the Gaming Act of 1835. Games for other purposes have been declared null and void by the Gaming Act of 1845. If a transaction is void it is unenforceable only between the parties; but if the transaction is illegal, even collateral transactions become unenforceable. In 1892, however, other acts were passed which made all monies paid under or in respect of wagering contracts declared void by the Gaming Act of 1845 unrecoverable and no commission or remuneration could be recovered by the agent for such transactions.

Indian law.

In India these complications do not exist. The wagering contracts are merely void. If, however, the transaction comes within the definition of sec. 294 of Indian penal Code the transaction as well as its collateral transaction would be illegal, unless specially sanctioned by the Government.

Where wagers are void the collateral contracts will be legal. Sec 30 of the Indian Contract Act does not affect agreements or transactions collateral to wagers.¹ A broker may sue for his commission in respect of wagering transactions² and an agent may recover from the principal all losses paid by him on behalf of his principal.³ Similarly the principal may recover all monies received by the agent on behalf of his principal.⁴ The money lent for gaming or to liquidate gaming debts is also recoverable⁵.

Bombay Act III
of 1865.

This rule has, however, been modified as far as the Bombay Presidency is concerned by Bombay Act III of 1865⁶ under which all contracts knowingly made to further

1. Gulam vs. Padamsi A. I. R. 1923 Nag. 48 : 69 I. C. 186.

2. Bisheshwar vs. Jwala Prasad (1914) 36 All. 426; Ally Moola Industrial Corporation Ltd. vs. M. A. Esmail A. I. R. 1925 Rang. 284: 90 I. C. 676.

3. Shibbo Mal vs. Lachhman Das (1900) 23 All. 165; Daya Ram vs. Murli Dhar A. I. R. 1927 All. 823: 49 All. 926: 25 A. L. J. 93; Pirthi Singh vs. Motu Ram A. I. R. 1932 Lah. 356: 138 I. C. 241; Ch. Bidhi Chand vs. Kachhu-Mal (1923) 45 All. 503 : 73 I. C. 477: A. I. R. 1923 All. 585; Arjan Dass vs. Walaiti Ram A. I. R. 1928 Lah. 420 : 108 I. C. 58; Ally Moola Industrial corporation vs. Esmail A. I. R. 1925 Ran. 284 : 90 I. C. 676; Chhekka vs. Gajilla (1904) 14 M. L. J. 326; Jagat Narayan vs. Sri Kishan (1910) 33 All. 219 : 7 A. L. J. 1146.

4. Hardeo Dass vs. Ram Prasad (1927) 49 All. 438 : 25 A. L. J. 223:100 I. C. 774 : A. I. R. 1927 All. 238; Maungpo vs. Brahma Din (1929) 7 Ran. 300: 119 I. C. 740 : A. I. R. 1929 Ran. 244; Ram Prasad vs. Ramji Lal (1927) 25 A. L. J. 736 ; A. I. R. 1927 All. 795: 103 I. C. 218; Bhola Nath vs. Mol Chand (1903) 25 All. 639.

5. Subharayya vs. Devendra (1884) 7 Mad. 301; Bani Madho vs. Kaunsil (1900) 23 All. 452; Pringle vs. Zafar Khan (1883) 5 All. 443 : 3 A. W. N. 68.

6. Ram Chandra vs. Ganga Bishan (1910) 12 Bom. L. R. 590.

or assist the entering into, or carrying out of agreements by way of wager, and all contracts by way of security for performance of such agreements or contracts are rendered null and void. So even the collateral contracts are unenforceable and a losing party cannot recover money in deposit with the stake holder.¹

There are five conditions of wager:—

1. The contract should be to deal in difference of prices only and not to give and take delivery. Ingredients of
wager.

In *Kong Yee Lone & Co. Vs. Lanjee Nanjee*,² their Lordships of the Judicial Committee observed:—

“If the circumstances are such as to warrant the legal inference that they (the parties) never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of goods should vary from the contract price at the given time, that is not a commercial transaction but a wager on the rise or fall of the market.”

In order to make a contract of this kind a wager, there must be from the outset, a common intention of the parties to take and accept no delivery and to deal in differences.³

II. The intention to wager should be from the very beginning.

If a contract is wagering in its inception the mere fact that in certain circumstances delivery could be asked for would not change the nature. The contract would still be unenforceable as a wagering contract.⁴ Conversely, if a contract is valid in the beginning subsequent agreement not to demand or give delivery does not make the contract a wagering one.⁵

III. There must be a definite agreement to wager.

Mere contemplation that delivery would not in fact be likely to be demanded is not sufficient to make the contract a wagering one. There must be a definite agree-

1. *Dayabhai vs. Lakhmi Chand* (1885) 9 Bom. 358.

2. (1901) 29 Cal. 461.

3. *Mulchand vs. Kanhaya Lal* (1929) A. L. J. 262 : 112 I. C. 791; A. I. R. 1929 All. 134; *Sasson vs. Tokersey* (1904) 28 Bom. 616 : 6 Bom. L. R. 521; A. I. R. 1922 Pat. 220 : 69 I. C. 769; 15 S. L. R. 5 : A. I. R. 1921 Sindh 114 : 70 I. C. 864; 45 M. L. J. 716 : 18 M. L. W. 911; 33 M. L. T. (H. C.) 223; A. I. R. 1924 Mad. 378 : 76 I. C. 893; A. I. R. 1923 Nag. 324 : 75 I. C. 906; A. I. R. 1928 Lah. 420 : 108 I. C. 58; 27 Bom. L. R. 941 : 49 Bom. 689 : A. I. R. 1925 Bom. 511 : 89 I. C. 885; 10 L. L. J. 522 : A. I. R. 1929 Lah. 375 : 115 I. C. 424; 31 Bom. L. R. 158 : 53 Bom. 367; 30 Cr. L. J. 595; 12 A. I. Cr. R. 466; A. I. R. 1929 Bom. 157 : 116 I. C. 251.

4. 23 M. L. W. 105 : A. I. R. 1926 Mad. 326 : 93 I. C. 169.

5. 26 N. L. R. 125 : A. I. R. 1930 Nag. 111 : 120 I. C. 406.

ment that delivery could not be demanded in any event.¹ In the absence of common intention to wager there can be no *Badni* or wagering contract. The liabilities incurred on transactions where there is such common intention to wager would be obviously unenforceable.² That there has been no delivery but only payment of differences in numerous other transactions between the parties, is not sufficient to prove that the contract is wagering.³ Provision in contract for breach, namely, that if the market price on the due date fell and the purchaser did not take delivery, then he was to pay loss and that if the market went up and the vendor failed to give delivery then the vendor was to pay the loss, does not make the contract a wagering one.⁴

IV. Intention to wager must be by both the parties.

A contract is not wagering where an agent makes it on behalf of his principal, with third parties who do not intend to deal only in differences, though between the agent and the principal there is an understanding that the principal would not be called upon to take or give delivery but merely to pay the difference. To make a transaction a wager, it is essential that the common intention of the two parties actually dealing should be to deal in differences only.⁵

V. The intention to wager should be determined by the totality of circumstances.

In order to ascertain if the contract is wagering the court must not confine itself to the transactions as they appear on the face of them; but must go behind and beyond them and consider the surrounding circumstances, the position of the parties and the general character of the business carried on by them. The court must not allow itself to be misled by the mere rectitude of document or the mere protestation of one of the parties as to the real intention.⁶ Whether the transaction is speculative or wagering, must be determined by the real intention of the parties. When a defence of wagering contract is raised the court is

1. 45 M. L. J. 716; 18 M. L. W. 911; 33 M. L. T. 223; 1924 M. W. N. 133; A. I. R. 1924 Mad. 378; 76 I. C. 893; 10 L. L. R. 522; A. I. R. 1929 Lah. 375; 115 I. C. 424.

2. A. I. R. 1928 Lah. 420; 108 I. C. 58.

3. A. I. R. 1924 Nag. 290; 78 I. C. 966.

4. 26 B. L. R. 1194; A. I. R. 1925 Bom. 115; 85 I. C. 177.

5. 26 Bom. L. R. 1097; A. I. R. 1925 Bom. 79; 85 I. C. 613.

6. 9 Bom. L. R. 125; 3 Bom. L. R. 476; 7 Bom. L. R. 385; 30 Bom. 83; 1 Bom. L. R. 786; 24 Bom. 227; A. I. R. 1934 Nagpur 129.

bound to scrutinize the evidence of the defendant with a good deal of suspicion, specially where the defendant receives and accepts payments when the dealings are successful, but has recourse to the plea of wagering when the transactions end in loss.¹

VI. In a wagering contract the collateral agreements can be enforced.

Wagers are only void and therefore collateral transactions will not be affected.² The word "void" in this section does not mean "unlawful." This head may be divided into following sub-heads:—

(a) Collateral liabilities between principal and agent are unaffected.

Collateral agreements in a wagering contract.

In wagering transactions the principal is liable to the agent for all losses paid or enforceable liabilities incurred by the agent on behalf of the principal to the third parties and is also liable to pay the commission of the agent.³ It should be noted that the agent should have actually paid the losses; where no payment to third party is proved or the agent has not entered into enforceable contracts with third parties on behalf of his principal, the suit by the agent will not lie.⁴ Conversely, the principal may sue the agent, employed to carry out wagering contracts, for accounts and to recover the money held by the agent for the principal whether such money was received by the agent from third party or from the principal himself by way of deposit.⁵

(b) Promissory note for debt due on a wagering contract.

Where certain promissory notes were executed in respect of transactions which purported to be agreements

1. 33 C. L. J. 533; A. I. R. 1921 Cal. 362; 64 I. C. 809.

2. Gulam vs. Padamsi A. I. R. 1923 Nag. 48; 69 I. C. 186.

3. Prithi Singh vs. Matu Ram A. I. R. 1932 Lah. 356 : 138 I. C. 241; Chowdhri Bidhi Chand vs. Kachhu Mal (1923) 45 All. 503 : 73 I. C. 477 : A. I. R. 1923 All. 585; Arjan Dass vs. Willaiti Ram A. I. R. 1928 Lah. 420 : 108 I. C. 58; Ally Molla vs. Esmail A. I. R. 1925 Rang. 284 : 90 I. C. 676; Chekka vs. Gajjilla (1904) 14 M. L. J. 326; Pringle vs. Jafar Khan (1883) 5 All. 443; see also A. I. R. 1929 Lah. 375 : 115 I. C. 424; 33 All. 219 : 7 A. L. J. 1146; 25 A. L. J. 693; A. I. R. 1927 All. 823; 102 I. C. 605; 60 I. C. 856; 23 All. 165; 1901 A. W. N. 33.

4. A. I. R. 1925 All. 102 : 86 I. C. 656; A. I. R. 1929 Lah. 375 : 115 I. C. 424.

5. Hardeo Dass vs. Ram Prasad (1927) 49 All. 438 : 25 A. L. J. 223 : 100 I. C. 774 : A. I. R. 1927 All. 238; Maungpo vs. Brahma Din (1929) 7 Ran. 300 : 119 I. C. 740 : A. I. R. 1929 Ran. 244; Ram Prasad vs. Ramji Lal (1927) 25 A. L. J. 736 : A. I. R. 1927 All. 795 : 103 I. C. 218; Bhola Nath vs. Mulchand (1903) 25 All. 639; Shibho Mal vs. Lachman Das (1900) 23 All. 165.

for actual purchase of goods but were really intended only for the payment of money by either party to the other according to the chances of the market; held that the promissory notes were given in consideration of gambling transactions and are unenforceable. Privy council held recently that where the consideration of a promissory note is the loss sustained by a party on a wagering contract, a suit will not lie for the recovery of the amount due on the promissory note.¹ A person lending money for the purpose of paying off a gambling debt does nothing immoral and is entitled to recover back the money.²

(c) Suit for damages.

No suit lies for damages for breach of a wagering contract.³

(d) Suit to recover deposit.

The loser of a bet can recover his deposit from stake holder if he demands it from the latter before paying over to the winner, but cannot recover from the winner if it is held by the stake holder for the winner inspite of plaintiff's protestations.⁴ Similarly money deposited with a third person as security for losses incurred in respect of a Badni contract is recoverable.

(e) Arbitration in respect of wagering contract.

An agreement to refer matters in dispute to arbitration arising out of a gaming or wagering transaction, if part of the same contract is void.⁵

(f) Agreement between pakka arhatia and his constituent:—

A transaction between a pakka arhatia and his constituent may be speculative but it does not mean that it is a wagering contract.⁶ If, however, it is proved that the transaction was wagering the contract cannot be enforced for the constituent and the pakka arhatia stand to each

1. 21 I. C. 878 : 35 All. 558.

2. Bani Madho vs. Kaunsal (1900) 22 All. 452 : 1900 A. W. N. 170; Subharaya vs. Divendra (1884) 7 Mad. 301.

3. 49 M. L. J. 300 : A. I. R. 1925 Mad. 971 : 86 I. C. 299; A. I. R. 1930 All. 525.

4. Manug Po vs. Aung 3 Rang. 543 : 4 Bur. L. J. 209 : A. I. R. 1926 Rang. 48 : 93 I. C. 105; 46 I. C. 755; (1918) M. W. N. 230 : L. W. 518; 44 I. C. 318; 18 A. L. J. 513; 42 All. 449; Ratna Kali vs. Vachalapu 109 I. C. 377; Re Uppasini 52 M. L. J. 179; 22 Q. B. D. 680.

5. Lee vs. Dobnuny (1927) 1 Ch. 300; A. I. R. 1923 Cal. 759.

6. 29 Bom. L. R. 147; A. I. R. 1927 Bom. 125; 100 I. C. 993; 15 Bom. L. R. 85; 19 I. C. 29.

other in certain respects as principal to principal. In a suit by the pakka arhatia against his constituent, the question whether the contracts made by the pakka arhatia in pursuance of the instructions are wagering or not is relevant. That at the time the contract was entered into, it was the common intention of both parties to wager must be proved by the party relying on the defence of wagering and to ascertain such intention the court can take into account the surrounding circumstances.¹

Where contracts between a pakka arhatia and his constituent are shown to be wagering contracts, they cannot gain validity by the mere fact that the other contracts which the pakka arhatia has entered with the third parties to cover the first named contracts have not been shown to be wagering contracts.²

When a forward commercial contract regular in every outward particular from first to last is repudiated by one party on the ground that it is a wager the court should always incline strongly to take the contract to be in reality what upon its face it appears to be.³

If a speculator after judging all the circumstances that are likely to determine the trend of prices in future, say October, comes to the conclusion that the price of that commodity will rise, he will decide to buy October futures. If his judgment is not wrong and the prices do rise he sells away those futures before the end of October and thereby makes profits. Similar feeling might be shared by most of the speculators who will all indulge in immediate purchases. Thus suddenly an artificial demand is created in the market, prices rise and the consumption is curtailed. Such type of speculators who try to make money by this unexpected rise in the market are called *Tejiwalas* or *Bulls* and their purchase transactions are called *kharid ke saude*.

Bull and Bear
'Kharid ka sauda
and Bech ka
sauda.'

If a speculator, on the other hand, thinks that October futures will fall he will sell October futures. If the prices go down he will by buying at lower prices deliver or cross the transaction what he had contracted to sell at higher prices. Thus he will make his profits. Others similarly minded will all sell. In this way an artificial supply will be put in the market and the prices will fall. Such speculators who try to make profit by an expected

1. 37 Bom. 347; 14 Bom. L. R. 807; 17 I. C. 152.

2. 22 Bom. L. R. 406; 57 I. C. 129.

3. 15 Bom. L. R. 85; 19 I. C. 29.

fall in prices are called *Mandi wallas* or *bears* and their transactions are called *Bech ka sauda*.

Forecast is a task of wide information and long experience. For instance, in wheat speculation the speculator must know the condition and extent of future wheat harvest of the world, the effect of weather changes in distant countries, the present stock, the tendency of demand, the movements of agricultural trade cycles, the trend of money markets and the nature of dealings and tone in the large wheat markets of the world. Such expert speculators are very few in Indian Mandis. The index is generally taken from Liverpool and Chicago prices. The amateur speculator, however, flocks in on rumours of high or low prices or on astrological forecasts. The village people still rely on conditions of rain-fall and taking them to be the sole index of prices go to the Mandis and deal in speculation. In such cases, the forecast not being based on correct data, the chances of loss are many. Generally such people are of limited means and cannot bear big losses. They, therefore, limit the amount of their losses by doing *Teji Mandi* or *Nazrana* transactions. The applier is called *Nazrana laganewala* and the acceptor is called *Nazrana khanewala*. The premium paid in a *Teji Mandi* contract differs from *Sai* and *chuk* paid in an ordinary forward contract. In order to make the explanation of *Nazrana* contract easier it is necessary to explain the working of an ordinary speculative transaction.

Speculative and Badni transactions.

In business circle speculation is carried on in the following manner:—

For the sake of example we would take wheat trade. The traders store wheat in grain pits called *khattis*. *Khattis* are of different size. The capacity varies from 200 maunds to 1000 maunds. Grain is also stored in *kothas* or rooms built of bricks and masonry. It is on the strength of the storage that forward transactions are carried on. In the western districts of U. P. each transaction of *Sauda* is called a *Bijak*. The weight of *Bijak* differs in different districts. In Muzaffarnagar a *Bijak* is equivalent to 200 maunds of wheat, at Hapur it is 25 tons and so on. The *Bijaks* are deliverable in a certain month. The parties cannot select the month at will. The chambers generally regulate the month of the forward *Saudas* each year *e. g.* *Jaith, Sawan, Maghsir and Mah*. Parties can contract *Saudas* of these months only. If A has purchased 100 *Bijaks*

of *Mah* delivery he is entitled to get that quantity of wheat in *Mah*. A can force B to give that quantity of wheat and B can force A to take delivery of the same. The settlement takes place on the last day of the month to which the *Sauda* relates. There are three methods of settlement.

(i) First is the case of actual delivery of grain. Methods of settlements. When a *khatti* is delivered in lieu of a forward contract the extra amount (*khatti* invariably contains more than 25 tons or 200 maunds) is charged at the market rate prevailing on the day on which the *khatti* is delivered. The *khatti* is delivered by handing over the *langot* (a *parcha* containing full details about the weight and quality of grain stored in the *khatti*) with which goes the ownership of the *khatti*. If the purchaser stands in immediate need of export of grain or for some other use he may get the *khatti* opened at once otherwise it is transferred from hand to hand only by means of the transfer of *langot*. The *khatti* is delivered unopened; the presumption being that the entries in the *langot* are correct. The actual weight is checked when the last purchaser opens the *khatti*. Each intervening transaction of purchase or sale is settled by the payment of difference in the prices.

(ii) Where, however, the purchaser has no money to pay for the grain or somehow he declines to accept delivery and similarly where the seller refuses to give delivery a settlement between the parties takes place at a rate fixed by the chamber or some committee. It is called settlement rate or *Miti Bhao*.

(iii) Both the above transactions are genuine transactions. There is, however, a third case. Suppose A buys 100 *Bijaks* at a certain rate but he sells away the same before the due date. In this way he settles purchases by the cross contracts of sales and relieves himself of the responsibility of taking or giving delivery. He does accounting with his *arhatia* and differences are paid and received as the case may be. By this means a man might carry on business at a scale far higher than his financial position could allow if actual delivery was to be taken. There is the implied belief in his mind that he would not have to take or give delivery of actual goods. If in the *Mandi* the stock is of, say, 1000 *khattis* transactions of lacs of *khattis* are done in the belief that the majority of the contracts would be settled only on the differences of rates. Yet if a man does not choose to settle his bargains

by cross contracts the question of delivery might arise on the due date. Thus in each case the contract may be genuine or a wager.

Grain speculation is carried on in terms of *khattis* or maunds. In silver the speculator deals in bars while in cotton the transactions are done in terms of bales or *khandis*.

Sai and chuk.

Nazrana differs from *Sai* and *Chuk*. The *nazrana* is a premium which is paid once for all and cannot be increased on the ground that the trend of the market is more adverse than was expected, as would be seen in connection with *Teji-Mandi* transaction. In ordinary forward contract *sai* is taken by the arhatia from his constituent as earnest money or advance deposit and if the market fluctuates adverse to the contract of the constituent beyond this deposit the arhatia calls for further deposit called *chuk* or cover money. These deposits are by way of security for losses incurred by the constituent. They are liable to be refunded in case the constituent makes profit and are taken into account in calculating the liability of the constituent in case of loss.

Tampering the market.

The amateur does not lose merely by his wrong forecasts but also by the deliberate acts of the expert speculator. The expert indulges in abnormally excessive sales and purchases and thereby causes violent fluctuations, in the market in the hope of making big profits. The speculator begins large purchases and prices begin to rise. Others are led away by the artificial trend of the market and they also indulge in profiteering bull contracts. Thus an unwarranted boom is brought about for a very short time for the actual conditions will again bring the price back to the normal. Similarly in abnormal sales an artificial depression is caused in the market and prices tend to go down far more than they would otherwise have done. Such deliberate forcing up or bringing down of prices is done near the due date for delivery so that the transactions may be settled or deliveries may take place at favourable prices. The big speculator who has lot of money also sometimes purchases all the available ready goods in the particular market and then asks for delivery from the small speculators who cannot in the short time provided to them bring goods from other places. In this case also they are forced to yield and to settle the contracts at more adverse prices. The big speculator sometimes adopts other methods to bring about abnormal fall or rise in the market and at

the same time provides for his own safety. He often deals with two or three markets at the same time. Whenever he indulges in very big sales or purchases in a particular market, he goes on entering into corresponding cross contracts in the other markets. In this way he brings about more differences in prices between the two markets than would normally have been and makes profit in the tampered market on the day of the settlement. These are the unhealthy features of speculation. The state should protect the ignorant and poor speculators from being taken undue advantage of by professional speculators who not only know about the poor resources of their own constituent but also about the total storage in the particular market and the conditions prevailing in the neighbouring markets.

Teji, Mandi or Teji-Mandi transactions.

Teji-Mandi contract or the dealing in options is the third kind of business named in the dealings in future. It is much more complicated. If a speculator thinks that in near future the market will go up or go down but does not want to undergo the risk of unlimited loss or has no money to pay the cover beyond a certain amount he would undertake Teji or Mandi business and thereby limit his chances of loss to the extent of the premium paid and keep the chances of profits unlimited. The method of dealing of (1) Teji and (2) Mandi contracts i. e. single options was explained by Young J., of the Rangoon High Court¹ in a case of forward contracts in rice:—

“Now a Teji contract for rice as entered into in the Rangoon market seems to be as follows:—There are two parties, the one being the buyer and the other the seller, who is called the person who eats Teji (A Gujarati word meaning ‘rise’). The latter in payment of a fixed sum small in relation to the value of the quantity of the rice dealt in, agrees to sell and deliver rice in a certain month at a certain price but not to deliver it and demand the price unless called upon to do so. It is virtually the purchase of an option or right to call for so much rice during a given month, the *Teji-eater* being bound to supply if called upon, but the other not being bound either to demand or in default of a demand to accept delivery. If, therefore, the market price rises above the contract price it will be to the interest of the buyer to call for delivery; if on the other hand it falls below the contract rate, it will be to his

Teji contract.

1. Dhunji Deosi vs. Polermall Anandroy (1913) 24 I. C. 441, 442, 443.

interest not to do so. As delivery may be given during the whole month, the purchaser of the option naturally waits till towards its close for fear of a sudden fall between his call for delivery and the actual delivery."

Mandi contract.

"In a Mandi contract the procedure is the same, but the parties deal on the chances of a fall. A similar fixed premium is paid to the *Mandi-eater*, who in consideration thereof agrees to buy rice forward from the other party at a certain fixed rate. The *Mandi-eater* signs a bought note, but the other party signs no sold note. If the market falls below the Mandi-rate, the *Mandi-eater* is called upon to take delivery of the contract quantity and to pay more than the market price of the day. If it does not fall below the price the *Mandi-eater* keeps the fixed premium but does not attempt to demand delivery. Each contract, therefore, whether Teji or Mandi is unilateral and not reciprocal. The purchase of an option in a Teji contract is to buy and in a Mandi contract is to sell rice at a given price in a given month."

The nature of these contracts was explained by Kincaid J., in a Bombay case¹ in the following words:—

Teji-Mandi transaction.

"There are three common forms of speculation in Bombay. They are known respectively as (1) Teji-Mandi, (2) Teji and (3) Mandi. The word Teji means brightness, the word Mandi means dullness. Thus Teji is used to signify a rise in the market price of goods or stock, and Mandi to signify a fall. (1) In the Teji-Mandi transactions, which have been very carefully examined by Beaman J., in *Jessiram Juggonnath Vs. Tulsidas Damodar*,² one party buys what is known as a double option. For this he pays a certain premium, say Rs. 20/- per Rs. 1,000/-. On the settling day the buyer has the right to declare himself either a seller or a buyer. If the market falls he will declare himself a seller. If it rises he will declare himself a buyer, e. g. if it be supposed that by the contract price a bar of silver or a bale of goods is worth Rs. 100/-. A buys the double option for Rs. 20/-. If the goods fall to Rs. 90/- he will declare himself a seller and will lose Rs. 10/-. If the goods rise to Rs. 110/- he will declare himself a buyer and lose Rs. 10/-. But if the goods rise to Rs. 150/- or fall to Rs. 50/- he will declare himself a buyer and a seller respectively and in each case will make Rs. 30/- profit. In other words

1. *Manubhai Premchand vs. Keshavji Ramdas* (1921) 24 Bom. L. R. 60 62, 63.

2 (1912) 14 Bom. L. R. 617 : 37 Bom. 264.

to use Beaman J's phrase 'the party buying the double option (the Teji- Mandi) is backing the fluctuations of the market against its stability.' Conversely, the party who sells the double option backs the stability of the market against its fluctuations."

In this connection it should be noted that in a Teji-Mandi transaction the premium paid is never returned. So if the market goes up to Rs. 110/- and the operator declares himself a buyer he compensates Rs.10/- out of Rs. 20/-, the premium paid and thus his loss remains only Rs. 10/-. Similarly if the price goes down to Rs. 90/- and he becomes the seller he makes up Rs.10/- out of Rs. 20/- paid and again the loss is of Rs. 10/- only.

(2) "The Teji transaction is quite a different one. In it the buyer of the Teji (*Langadnaro* or applier) pays the seller (*Khanaro* or eater) a premium or Teji over and above the contract price of the bar of silver or bale of goods. If the market rises the buyer of the Teji who is also a buyer of the silver or the goods can ask the seller of the Teji to give him the goods or their value at the market rate on settling day whatever it be. If the market falls, the buyer of the Teji merely loses his premium, e. g. A buys Rs. 100/- worth of bar silver from B and also buys Teji by the payment of Rs. 20/- premium. If the market rises to Rs.150/-, A will make a profit of Rs.50/- minus his Rs. 20/-. If the market falls to Rs. 50/-, A will lose his Rs. 20/- premium or Teji only. A (the buyer of the Teji) thus insures himself against a big fall. B (the seller of the Teji) is not insured against a big rise."

(3) "The third kind of transaction is a Mandi. It is the exact converse of the Teji. The buyer of the Mandi or premium is a seller of the goods and the Mandi is the premium which he pays against a possible rise, e. g. A sells Rs. 100/- worth of bar silver to B and buys Mandi by the payment of Rs. 20/- premium. If the market falls to Rs.50/- A will make a profit of Rs.50/- minus his premium. If the market rises to Rs.150/-, A will lose his Rs.20/- premium or Mandi only." The description of these transactions was also given in a case¹ in which the dealing took place in camphor. After describing the *modus operandi* of these transactions the learned Judge Mr. Billimoria remarked, "In my opinion the agreements by way of Gulli or Teji-Mandi are not absolute contracts of sale and purchase

1. *Manilal Dharamsi vs. Alibhai Chagla* 47 Bom. 263.

at the date they are made. They become contracts of sale and purchase when the option to demand delivery or give delivery is exercised. Before the option is exercised they are agreements wherein one person for a cash consideration paid to him or promised to be paid on due date undertakes that he will place at the disposal of the other party a certain quantity of the commodity at a certain rate on the due date if such other party claims it, or undertakes to take up and pay for a certain quantity if the other party wishes to get rid of that quantity. In such contracts goods are delivered and taken delivery of and paid for at the time of option being declared to claim delivery or give delivery."

It should, therefore, be noted that at the time of the contract they remain merely executory contracts and they become executed contracts when the delivery actually takes place or the differences are settled. These transactions again came up for examination before Mirza J., in *Narain Dass Sunder Lal Rathi Vs. Jekisson Das Narain Dass*¹ which was a cotton case. In that case an attempt was made to distinguish the transactions in dispute from cotton contracts which are governed by Bombay Cotton Contracts Act. It was alleged that when the Teji-Mandi transactions were entered into there was no contract for sale or purchase of cotton at their inception. The learned Judge agreeing with this contention remarked as follows:—

"The nature of the Teji-Mandi transactions was that in consideration of the premium paid or agreed to be paid to the defendant, the defendant agreed to give to the plaintiffs the double option on the due date to declare themselves either a purchaser or a seller at the rate mentioned in the Teji-Mandi. This option might never come to be exercised in which event the party paying the premium would lose their premium. If the market does not fluctuate at all and the rate at the due date remained the same as that given in the Teji-Mandi, there would be no need to exercise either option. In case the market had fluctuated either way on the due date of the option, the plaintiffs would find it to their advantage to declare themselves either purchaser or seller whichever alternative might be to their advantage and hope to pocket ultimately the difference that might be in their favour between the agreed rate in the Teji-Mandi and the rate on the *Vaida* day. In this way they might regain part or whole of the premium paid and if the fluctuation exceeded the limits of the premium, then they

1. Suit No. 2068 of 1931 unreported judgment dated 14th September 1932 (Bombay High Court).

might stand also to make a profit. On the exercise of the option the resulting contract might ensue or the parties might be content to settle the transaction by means of receipt and payment of difference between the market rate and agreed rate under the *Teji-Mandi*." In *Teji-Mandi* transactions the person who pays the premium is called '*Teji-Mandi laganewala*' and the person who accepts it is called "*Teji-Mandi khanewala*."

Nazrana transaction

What is called a *Teji-Mandi* contract in Bombay is known by the name of Nazrana contract in the Punjab. In a Lahore case¹ Nazrana contract in gold transaction was described as follows:—

"It would appear that what happens in a contract of this nature is that one party pays a premium to the other party, thus acquiring an option to buy or to sell as he decides, a certain quantity of gold at a certain rate on a certain date. Either on or some date prior to that date the purchaser decides whether he will buy or sell. According to this decision communicated to his broker the broker enters into a contract with some third person in order to meet the situation. On the due date the parties can either take or give delivery of the stipulated quantity of gold or settle on the difference."

It should be noted that it is not necessary that the option should be exercised on the due date. It may be exercised earlier. On the exercise of the option by the applier, the contract either of purchase in *Teji* contract or of sale in the *Mandi* contract or of purchase or sale in the *Teji-Mandi* transaction becomes complete. He may also close the contract by a corresponding contract of sale or purchase in the *Teji-Mandi* transaction or of sale in *Teji* or purchase in the *Mandi* transaction, on or before the due date of the particular *Vaida* and then he has to pay or receive the difference as the case may be. A *Vaida* is a promise to purchase or sell goods in future. It should also be noted that in case of double option transaction the premium paid is not divided or split up into two halves for purchase or sale. It remains the same either way. The dictum of Beaman J.,² that in *Teji-Mandi* contract the premium is split up into two half on either side of the contract price, seems to be incorrect. Suppose on a price of Rs. 100/- a premium of Rs. 20/- is paid in a double op-

1. *Prithi Singh vs. Nathoo Ram* (1932) Lah. 356 : 138 I. C. 241.

2. *Jessi Ram vs. Tulsidas* 37 Bom. 264 : 14 Bom. L. R. 61.

tion transaction. If the price of the commodity on the last date of the option is Rs. 120/- or Rs. 80/- the applier would gain or lose, by the purchase or sale as the case may be, nothing as the difference in price is equal to the premium paid. It is beyond these fluctuations that he has any chance of gain by the exercise of the double option. If, however, the dictum of Beaman J., were held to be correct the transaction would prove profitable should the fluctuation exceed Rs. 110/- or 90/- but it is not so. The technical word for exercising the option on the last date is called *Sahikarna*.

The descriptions given above are of simple transactions. It should not be supposed that the operator having once paid the premium sits and waits for the *Vaida* day. He takes advantage of the market fluctuations and turns over the transaction several times. If he has gone in for Teji he watches the movement of the price for that commodity. As long as the price rises he sits quiet. No sooner the price begins to fall he either accepts premium for Teji or goes in for Mandi transaction. In this way he tries to take advantage of the rapid fluctuations of prices and increases the chances of his profits.

The acceptor of the premium adopts a similar practice to safeguard himself. In the first place he relies upon his forecast of the stability of the market. The acceptor always gains if the market is stable. Secondly, he sometimes protects himself by a simultaneous cross contract. If he has accepted premium for Teji at a certain price he simultaneously purchases a similar *Sauda* at the same rate. Thus if the market goes up the two transactions rise parallel to each other and the acceptor loses nothing. The premium accepted is his gain. Similar is the case with the acceptance of the premium for Mandi. To take a concrete instance suppose A accepts eight annas per maund as premium from B for a Teji *Sauda* of hundred maunds deliverable in December at Rs. 3/- per maund. It means that he has offered to sell hundred maunds of that commodity at Rs. 3/- per maund deliverable in December, the present price being Rs. 3/- per maund. He at once purchases 100 mds. of that commodity of December delivery at Rs. 3/- per maund from C. If the rate goes up to Rs. 5/- on the *Vaida* day he offers to B whatever he bought from C or the differences are settled between B and C. A gains the premium accepted by him. If the price goes down and reaches to Rs. 2/8 per maund the purchase

from C is cancelled by a cross contract of sale. If the price goes down still and reaches to Rs. 2/- per maund B will not exercise his option and will lose the premium. The similar is the operation in a Mandi transaction. In case a Teji-Mandi premium or *Nazrana* is accepted by A he watches the trend of the market. If the price is going up B is likely to exercise his option to purchase and in such a case the acceptor A enters into an identical purchase transaction with C. If the prices are going down the likelihood is that B would elect to sell and so A enters into an identical *Sauda* for sale with C. He tries so to manipulate that on the *Vaida* day settlement should take place between B and C, himself retaining the premium as his gain.

Put-Call-Put and Call transactions.

What is known as Teji Mandi contract in India is called Put and Call transaction in London. The Teji is called Put and the Mandi is named as Call. The general name given to such transactions in London Stock Exchange is known as "options". The *Nazrana* is called the option money. Mr. F. E. Armstrong in his book on Stock Exchange 1934 Edition at pages 113 to 123 has described these transactions. A few extracts from these pages may be quoted with great advantage:—

"Single option consists of giving or receiving money for either the "call" or the "put" of Stock or Shares at an agreed price. Like any transaction entered into by a 'bull', 'bear' or 'stag', the ultimate aim is profit. We will assume that we are greatly impressed with the prospects of "Eldorados", and confidently expect them to rise in price. We arrange, therefore, to "give" 2s. 6d. a Share for the "call" of one hundred Shares. The price at which the deal is arranged, 25s., is near the price at which they stand at present. We then have the right to become the owners of these Shares at 25s. at the date decided upon. We are not called upon to finance the Shares. All we can lose is the 2s. 6d. per Share plus expenses. What we can gain is unlimited. If the impression we have formed is correct, they may move up 2s. 6d. a share or more in one day. Between the period when we purchased our option and the date it expires they may have doubled in value. In that event we could then sell our Shares at, say 50s., and call them, namely buy them, not at the market price, but at our original figure of 25s. This is a simple and successful option deal, and the usual practice of "declaring" the option on Declaration Day would be unnecessary. This option would "declare

Single option.

itself". Where a verbal declaration is necessary is when, at the time of expiry of the option, the market price approximates to the option price which we fixed. Then it is for us to instruct our broker to declare how we wish to act. If the price was just 25s. we should probably abandon our option. If it were 26s. then naturally we should call the Shares, and the 1s. difference we could secure by selling would be saved from the 2s. 6d. per share we had given for the option. If the price were over 27s. 9d. (that is allowing for the 2s. 6d. option money and 3d. per Share commission), then by selling we could secure a profit. If the Shares had not moved during the period, or had gone down, the option would be abandoned. No matter to what level they had descended, our liability would be only 2s. 9d. per Share. We "gave" for the "call" expecting them to advance. As our view was incorrect, we lose our option money and no more. Therein lies the advantage over an outright purchase which increases liability to the whole value of the Shares, as it is possible for them to become valueless before we can sell them and cut our loss.

Now let us assume the "put" is decided upon because we form the opinion that a Stock or Share is too high in price. The procedure is the same; we pay for the privilege or right of selling at the present existing price Stock or Shares that we expect to purchase at a lower one. It is a "bear" transaction, just as "giving for the call" was a "bull" transaction. At the end of the agreed period if our "bearish" view proves correct, we "put" or sell our Stock or Shares at the pre-arranged higher price and buy them back at the depreciated level. The difference in the two prices, less expenses, is our profit. If, instead of falling in price, a rise takes place our "put" option is abandoned, and our loss is limited to the amount of the option money and commission paid, no matter to what height the security has risen. Here, again, the advantage can be seen, as a "bear" position exposes one to an unlimited loss, there being no limit to the extent to which a price may rise.

These two examples are of cases where option money is "given." Option money can be "taken," as was done by the firm with whom we dealt in the two quoted instances. If we were of opinion that little move was to be expected from the shares in question which we possessed, we should have no objection to taking 2s. 6d. a Share if it were offered to us for the option to "call" them from us within three months at the price then prevailing. At

least we should be certain of receiving 2s. 6d. per Share, as, whether exercised or not, the option money would be ours at the end of the period. If the Shares are "called" we have to deliver them at the option price. If the shares are not called, the option money reduces the cost of them to us. Thus we reason as we "take" the option money offered. The view we have when we "take" money for the "put" is that we consider the price of the Shares or Stock to be the correct value of them, and should not mind if we were called upon to buy them, at a price less by the amount of the option money than the current price. Here, again a consideration is offered us for a view that may not eventuate. We are "bullish" and do not mind the risk, while the "giver" is "bearish" and does not mind paying for his doleful expectancy. Thus it comes about we "take" for the "put." If at the end of the period the price is lower than the option price, the Shares are "put" on us at the option price. Then we sell them and either reduce our receipts from the option money or "cut a loss." If the price is higher, we pocket the option money, and the operation would be successful from our point of view as a "taker."

In addition to the above options there is another kind of option, which, because of its greater risk and potentiality, is approximately twice as costly, namely, the "Double Option."

A double option is the right either to "put" or "call" a given Stock or Share at an agreed price on a given date. This transaction has all the combined advantages of the single options we have outlined, and makes provision for both emergencies. A person who buys such an option is in a position to reap an advantage whichever way the market price moves. He, of course, has paid for this privilege, and the only problematical point at the time the double option is purchased, is whether the movements in the security in which he is interested will be of such proportions as will cover him for his expenditure. On the face of it, it looks as if a person who "gives" double option money cannot make up his mind which way the market is likely to go, and in some respects this is so. An operator may have a very decided view concerning a Stock or Share, but there may be such unsettling factors present as to make a measure of protection such as is afforded by a double option a very valuable possession. It is the unexpected that so often happens, and here, as with a single option, whatever the movement in either or both

Double option.

directions, one's loss is limited to the amount which is agreed at the time the option is entered into. We may remark that, unless the price of a security at the end of the period, usually three months, is exactly the same as it was at the time the double option was bought, it is impossible to lose the whole of the option money. This is a rare contingency, although such instances have occurred. Any difference either way at the expiration of the double option can be taken advantage of, and will be so much saved from the option purchase money, even if a profit is not obtainable.

In practice some surprising fluctuations occur within the maximum period allowed for options, and shrewd "givers" make this form of operating profitable, particularly in unsettled times. It must not be overlooked that "givers" of option money can, and do, deal during the period the options are in force selling on a sharp rise and purchasing on a fall. The possession of a double option is often a valuable protection allowing an operator to sell knowing that he has the "call" or purchase knowing that he has the "put". If he can close his transaction at a profit it is usually possible to deal for settlement at the same date as the expiry of his option. This obviates contangoes or uneven positions during the unexpired period of the option, and the operator retains his option to its maturity.

Here is a case quoted in round figures for the sake of simplicity.

A "giver" pays £5 a Share for the put and call of some American Shares at £30, for three months. If these American Shares fall to £20 at any time during the three months, it is clear that, if they are bought, a net profit of £5 a Share less commission is available. If by the end of the period or at any time during the period they rise to £40, the Shares can be sold, and the same remark applies. It is, of course, necessary to deal against the option, in order to secure such profit, a pleasant privilege not likely to be overlooked. This position may have been established, but half-way through the period of the position. There still remains the opportunity having sold the Shares at £40, to buy them back if they slump to £20 and still have the right to "put" them at £30 at the end of option time. Or, having been bought on the set back at £20, they can be sold on any improvement to over £30, at which price the "giver" has the "call." These figures seem Utopian, but show the utility of the double option.

For a person who "takes" double-option money the position is not quite so straight forward. Actually he can never tell until the Declaration Day how he stands. Market developments may give an indication, but the final destination of the Shares or Stock on which he has taken money is not known until the end of the option period. The people who "take" double option money are usually those who feel that they cannot go far wrong in accepting cash. That is the one certainty in the transaction for them, the destination of the cash. The disposition of the security at the end of the option period is unknown. People who own shares or Stock, the movements of which they study, are not averse to accepting what appears generous terms for the double option. Their reasoning is that they have no objection to the Shares being "called" from them as they will then be securing a considerably higher price than the present, taking into consideration the option money they receive. If the Shares are "put", then it but adds to their present holding—if they decide not sell them—and, again allowing for the option money, they will be cheaper than ordinarily obtainable. This is the attitude of the operator who "takes" double option money. Should the security move but little, or having moved, it gets back to near the option price, then for him the operation has been successful, as he secures all or most of the option money as profit. If a pronounced rise takes place his shares are bought from him, but at least he has secured part of the advance in his option money. If a bad fall occurs, he is asked to take shares at a higher price than that at which he can buy them in the market and he stands to lose unless he has anticipated the set-back and has previously sold the shares.

The price charged for an option is largely dependent upon the marketability and the nature of the security, and also the current conditions which affect the particular Stock. It is obvious that an option on a Stock which seldom moves would be much cheaper than on one which fluctuates violently. It would be difficult to arrange an option in a comparatively unmarketable stock. Where contango facilities are restricted, abnormal rates are charged. Ordinarily, the "striking price", fixed for a "call" is the price at which the security is obtainable at the time plus a charge to embrace the contango. That for the "put" is the selling price plus a similar amount. For a "put" and "call" option the "striking price" is usually about the

middle market price at the time the option is arranged.

Naturally, all dividends, bonuses, rights, and other advantages accruing follow the option. If a bonus or dividend is declared during the life of an option, a "giver" who called his security would call it "cum everything". If he abandons his "call" he, of course, is not entitled to such bonus or dividend.

Declaration time on the day before Contango Day is interesting and often exciting. The adjustment of the various option positions on this day is often reflected in market prices. The people who use options as a medium for their dealing, and the firms who specialize in them, can be considered shrewd and skilful judges of market developments. Often an inquiry as to why prices in a particular market are better is answered by the significant remark "option buying." Market operators only "give" money when they hold decisive views, and, therefore, while it is not an infallible test of which way a particular market is moving, this powerful factor commands attention, and leads one to admit that frequently "Options speak louder than words."

The close similarity between Call and Put transactions and Teji-Mandi is sufficient to prove that the Indian Merchants adopted the commercial practices prevailing in England. How the Teji-Mandi transactions began in India is not known; but the system has so well been absorbed in this country that it has assumed indigenous characteristics like other mercantile usages.

Failure to exercise the options.

The failure may result from two causes namely, (1) which may be within the control of the operator and (2) which may be beyond his control like death, insolvency, lunacy or unavoidable absence of the buyer or the seller of option. In the first case the operator is bound by the legal consequences of his default, but in the second case three contingencies are likely to arise in the transactions of single or double options.

(1) The market may remain steady and on the date due the current price and the price on the day of the contract that is the unit price may remain the same.

(2) The market rate may rise above the unit price in the Mandi or fall below it in the Teji transaction.

(3) The market rate may fall below the unit price in the Mandi transaction or rise above it in the Teji transaction.

In the first two conditions failure to exercise the option does not matter. In these cases the contract automatically terminates for the applier would not have even in normal course of business exercised his option as it would have been of no advantage. The applier only loses the premium paid or agreed to be paid by him. Such a condition in the local market is called in Bombay "*Teji or Mandi dab gai*" and elsewhere "*Teji, Mandi or Nazrana puch gaya*." If the premium has not been paid it can be realized from the applier or his estate in case of his death. In the third case, the Teji transaction would automatically result in a purchase, the Mandi transaction would automatically result in a sale and the Teji-Mandi transaction would result in purchase or sale according as the prices rise or fall below the unit price. In London Stock Exchange such a condition is named by the expression "options would declare themselves." The seller of the option cannot declare the contract of Teji, Mandi or Teji-Mandi as closed before the due date by reason of death, insolvency, lunacy, or unavoidable absence of the applier. He is bound to keep the contract alive upto the due date. In the case of death, lunacy or insolvency he must give notice to his legal representative or official assignee as the case may be. The legal representative or the official assignee must reply as to whether they choose to exercise the option or not. If they fail to reply within a reasonable time, the contract would be deemed to be closed. The time usually given is 24 hours.

Conversely, it may also happen that the seller of the option may die, become insolvent or lunatic. In such a case if the applier chooses to exercise his option, the legal representative in case of death or official assignee in case of lunacy or insolvency should carry out the contract resulting from the option transactions.

Are speculative and Teji Mandi transactions wagering contracts?

As pointed above speculation is a mere contract in future. Speculative transactions are not necessarily wagering contracts. There must be affirmative proof that the contracts were not intended to be performed and that only differences were to be paid.¹

Speculative transactions and wager.

1. Bhagwan Dass vs. Burjorji (1918) 42 Bom. 373: 20 Bom. L. R. 561: 34 M. L. J. 305: (1918) M. W. N. 315: 16 A. L. J. 241: 7 L. W. 577: 44 I. C. 284; Ram Krishan vs. Ratan Chand (1931) 53 All. 190: 1931 A. L. J. 458: 35 C. W. N. 841: 33 Bom. L. R. 988: 53 C. L. J. 561: (1931) M. W. N. 733: P. T. O.

A contract to receive or deliver goods in future by persons who are in a position to carry out the contract at the time of making the contract is not necessarily wagering contract because of an element of speculation even if the contract provides for the alternative of receiving and paying on differences instead of actual delivery.¹ The mere fact that the parties had from excessive caution provided for the consequences of breach by either party, by inserting a condition that one or other should pay loss, will not be conclusive in favour of wager.² In a case where there is no proof of the contract in question being a wagering contract, the mere fact that the plaintiff has not established that he had made payments to third persons on the defendant's behalf or entered into enforceable liability on his account will not disentitle him to recover.³

Teji-Mandi
transactions
and wager.

The next class of cases are dealings in double options. These are much more complicated and there has been a lot of difference of opinion as to whether they are genuine or wagering contracts. Beaman J., in a case⁴ remarked:—

“While, therefore, I am now prepared to admit that it is open to any party suing upon a Teji-Mandi transaction to satisfy the court, if he can, that the particular instance was a genuine transaction, in which the parties did intend at the time of entering into it that delivery should be given and taken, I still think that the presumption would be strong against Teji-Mandi transactions as a class being genuine and lawful.”

34 M. L. W. 175 : A. I. R. 1931 P. C. 136 : 132 I. C. 613 : 61 M. L. J. 665 (P. C.)
(Distinction between genuine speculation and wagering transaction explained)
Sri Niwas vs. Ram Deo, (1922) 43 All. 585 : 19 A. L. J. 522 : 64 I. C. 65 : A.I.R.
1922 All. 360; Ali Moola Industrial Corporation vs. Esmail A. I. R. 1925 Ran.
284 : 90 I. C. 676 : Hazari Lal vs. Kesho Das (1923) 21 A. L. J. 153 : A. I. R.
1923 All. 273 : Ram Din vs. Mansa Ram (1929) 51 All. 1027 : (1929) A. L. J.
1140 : A. I. R. 1929 All. 890; see also Emperor vs. Thavarmal Rup Chand (1929)
53 Bom. 367 : Kunwar Bhan vs. Ganpat Rai (1926) 7 Lah. 442; Sukhdeo Das
vs. Govind Das (1928) 51 Mad. 96 : 27 M. L. W. 453 : 47 C. L. J. 144 : 30 Bom.
L. R. 238 : 26 A. L. J. 484 : A. I. R. 1928 P. C. 30 : 107 I. C. 29 : 54 M. L. J. 130
Sasson vs. Tokersey (1904) 28 Bom. 616; Bisheshar Dayal vs. Jwala Pd. (1914)
36 All. 426 : 12 A. L. J. 817 : 25 I. C. 415; Narain Rao vs. Hanumant Ram;
A. I. R. 1930 Nag. 273 : 124 I. C. 453 : 26 N. L. R. 277; 4 Bur. L. J. 174; 4 Bur.
L. J. 131 : A. I. R. 1925 Ran. 284 : 90 I. C. 676 : It was followed in 1929 A. L. J.
1140 : 51 All. 1027 : A. I. R. 1929 All. 890; A. I. R. 1924 Oudh 186 : 73 I. C. 309;
21 A. L. J. 153 : A. I. R. 1923 All. 273. Firm Aya Ram Tola Ram vs. Sadhu
Lal A. I. R. 1938 Lahore 78.

1. 43 All. 585 : 19 A. L. J. 522 : A. I. R. 1922 All. 360 : 64 I. C. 65 also
see A. I. R. Oudh 1924, 186 : 73 I. C. 309. (Speculation forms an element
in many transactions); Narbada Shanker vs. Mathuradas (1910) 12 Bom. L. R.
1058.

2. Balwant vs. Mishri Lal (1925) Bom. 115 : 26 Bom. L. R. 1194 : 85 I. C.
177 : Kadir Mal vs. Qadir Ahmad Ali A. I. R. 1924 Nag. 290 : 78 I. C. 966 : see
also Nerbada Shanker vs. Mathura Dass (1910) 12 Bom L. R. 1058.

3. Ganesh Dass vs. Har Bhagwan A. I. R. 1932 Lah. 273 : 138 I. C. 542.

4. Hariram vs. Trikamdas. Suit No. 100 of 1908 unreported decision of
Beaman J. (Bombay High Court).

In a later case¹ the same judge held.

"Teji-Mandi or Nazrana transactions must be essentially wagering as they are in the nature of betting on or against the comparative stability of the market."

The reason given by the Judge was that it was a matter of utter indifference to the seller of the option whether the buyer of the option becomes the buyer or the seller on the due date. In *Jesi Ram Jagan Nath Vs. Tulsi Dass Damodar*² his Lordship modified his opinion:—

In the first Teji-Mandi case I had to dispose of, I laid it down broadly that every such transaction must be a wager. In a later case a great deal of evidence was brought before me which led me to doubt whether there might not be exceptional cases in which, "Teji-Mandi" like the Liverpool double option might represent fair business dealings. I still, however, adhere generally to the view that in this country the rule ought to be that transactions shown to be "Teji-Mandi" are wagering transactions, and that the onus of proving that they are not would lie heavily indeed upon the party so alleging. Where there is a great business firm doing extensive buying and selling business in foreign markets, transactions exactly corresponding in every detail with the "Teji-Mandi" of the Bombay Bazar may no doubt quite honestly be entered into, and be indeed necessary for the successful conduct of business by way of providing a certain amount of cover, but where parties, who indulge in "Teji-Mandi" exclusively or where they have small dealings of their own, which may or may not be genuine, in forward contracts and make side "Teji-Mandi" contracts not really by way of cover, but by way of hedging, it is almost certain that the latter class of contracts are in their nature essentially wagers."

"Form the very nature of the transaction, from the fact of a man being utterly indifferent whether he is going to buy or sell, there must arise a strong presumption that he is not doing a genuine business and that the whole contract is really in the nature of a pure wager."

Again in 1915 he reverted to the old view³ and remarked:—

"I take this opportunity of reaffirming emphatically and now virtually striped of any qualification whatsoever, the opinion that in this market Teji-Mandi transactions are all wagers."

The view enunciated in these cases has been completely exploded in later cases. *Shah A. C. J.*, remarked in *Manni Lal Dharamsi Vs. Allibhai Chagla*⁴ that there can be no presumption that the Teji-Mandi contract is wagering simply because a man pays a certain premium to

1. *Ram Chandra Shivdas vs. Gangabisen Jaideo* (1910) 12 Bom. L. R. 590.

2. (1912) 14 Bom. L. R. 617, 623-24; 37 Bom. 264, 272, 274, 275.

3. *Basanti Lal Gorakh Ram vs. Shiv Narain Baldeo Das* unreported case No. 666 of 1935 dated 20. 9. 1916. (Bombay High Court).

4. (1922) 24 Bom. L. R. 812; 37 Bom. 263.

become a purchaser or a seller at a certain future date. The learned Judge "Beaman J." seems to believe that such transactions are pure wagers for the applier is utterly indifferent whether he is going to buy or sell. With great respect to the learned Judge, the proposition seems to be against the real nature of the Teji-Mandi transaction. The party buying the double option is backing the fluctuations of the market against its stability. He is not indifferent whether he buys or sells. He wants to take advantage not only of the rise but also of the fall whichever suits him best. There is nothing wrong in purchasing an option or a right to buy or sell a certain commodity, with the absolute and inevitable certainty of becoming a regular buyer or seller as the case may be. It is difficult to see how such a transaction can in any sense be called a wager. The true test whether a contract is a wagering contract or not is whether the parties at the time it was made did or did not agree that in any event it was to be settled only by payment of differences. The burden of proof lies on the party who alleges it to be wagering and unlawful.

The view of Beaman J., was also disapproved by Kincaid J.,¹ who remarked:—

"With all deference to the eminent Judge I am not sure that he did not go too far in his condemnation of Teji-Mandi dealing. The main ground upon which Beaman J., held Teji-Mandi business to be wagering was the "utter indifference of one party whether he was going to buy or sell." That ground is absent in Teji transactions. Therein the party who applies the Teji is always a buyer."

Thus in every case it is necessary to prove an agreement or understanding between the contracting parties that they never contemplated giving or taking any delivery but only intended to gamble in differences. Prima facie a Teji-Mandi transaction has been held to be valid in a number of cases.² In a Privy Council case.³ Lord Warrington remarked:—

"There is no presumption that such transactions (Teji-Mandi contracts) are wagers, and in the absence of evidence to the contrary they should be treated to be genuine contracts."

1. *Manu Bhai Prem Chand vs. Keshavji Ram Das* (1922) 24 Bom. L. R. 60, 64, 68.

2. *Emperor vs. Thavar Lal Rupchand* (1928) 31 Bom. L. R. 158; 53 Bom. 367; *Sobhag Mal vs. Mukand Chand* (1926) 51 Bom. 1; 28 Bom. L. R. 1397; 53 I. A. 241; *Dhunji Devsi vs. Poker Mal Anand Roy* (1912) 24 I. C. 441; *Laxmi Narain vs. Bala Prasad* A. I. R. 1938 Lahore 825.

3. *Sobhag Mal vs. Mukand Chand* 53 I. A. 241.

The nature of *Nazrana* contract was discussed in a Lahore case¹ and *Nazrana* contracts were treated on the same footing as Teji-Mandi contracts and were held not to be wagering. Even in England put and call transactions were at one time supposed to be wagering² but now this view has been discarded.³

Nazrana contracts and wager.

There are very good reasons for supposing a Teji-Mandi or *Nazrana* contract to be a genuine transaction. These contracts in many ways resemble a valid transaction.

(a) The premium paid is actually by way of earnest money showing the intention of the applier to take or give delivery of goods intended to be bought or sold by him on the exercise of the option.

(b) The day fixed for the exercise of the option is a day before the date for actual delivery. Thus after the exercise of the option the parties to the contract can insist on the actual giving or taking of delivery.

(c) The premium paid is by way of insurance against an adverse trend of the market so that the loss should not be unlimited.

(d) Very often the contract forms signed contain a clause for delivery of goods.

If behind all these ostensible signs of a valid contract the parties to the contract did intend to settle only in differences, the fact should be pleaded and proved. If initially the intention was that goods should be delivered from one party to the other and either party would call for or give delivery as the case may be, it is immaterial that later on they should actually settle by paying differences in the market rates or cancel the contract by cross contract. The contract would not lose the character of the genuine transaction. In speculative dealings the parties generally cancel the transaction by cross transaction and this accounts for numerous dealings before the actual delivery takes place, but it should not be inferred that the parties had no right to call for or give delivery unless otherwise proved. In short all these transactions should be presumed to be genuine.

1 Prithi Singh vs. Nathu Ram (1932) Lah. 356.

2. Sadd vs. Foster (1897) 13 T. L. R. 207.

3. Büttenlandsche Bank Vereeniging vs. Hildesheim (1903) 19 T. L. R. 641.

Note:—This case had been decided in 1903 long before the decision of Beaman J. in Hariram vs. Trikam Das and it is regrettable that this case was not put before his Lordship otherwise the decision would have been different and there would have been no disturbance in the business circle due to Teji-Mandi contract being declared wagering.

J. N. Das
Advocate High Court
Jammu & Kashmir
Binnagat

CHAPTER IV.

BROKER.

Who is a broker.

A broker is a mercantile agent, who in ordinary course of his business is employed to make contracts for the purchase or sale of property or goods but is not entrusted with possession of goods or documents of title.¹ The same definition has been given by the Allahabad High Court in *Sushil Chandra Vs. Gauri Shanker*.² His main function is to bring together the two parties to the contract and establish privity of contract between them.³ The commission which he gets for his work is called "Brokerage".

Difference between a broker and other mercantile agents.

A mercantile agent is one who buys and sells goods in the market in his own name on behalf of his employer while a broker cannot contract in his own name. He differs from factor in the sense that he is not entrusted with possession of goods or title deeds. Unlike *del credere* agent he ordinarily does not guarantee the solvency of the parties but in Bombay the brokers holding certificates of Bombay Native Share and Stock Brokers Association are *del credere* agents.⁴ He differs from an auctioneer in the sense that he Usually has no special property in the goods which he may be authorized to sell in the principal's name by a private sale.

Nature and extent of the authority of the broker.

The broker derives his authority from the terms of the appointment of his principal. The appointment may be made in writing or oral or may be inferred from the conduct of the parties.⁵ A broker has implied authority to act according to the rules and regulations of the particular market. If he has been authorized to sell, there is implied authority for selling on reasonable credit.⁶ In some cases, the broker may be entitled not only to negotiate, but also to enter into a contract so as to bind the

1. *Milford vs. Hughes* (1846) 16 M & W 174; *Foster vs. Pearson* (1835) 1 C. M. & R 849; *Baring vs. Corrie* (1818) 2 B & ald. 137 Halsbury Vol. 1 page 201 Hailsham Ed.

2. (1917) 39 All. 81 : 14 A. L. J. 873 : 36 I. C. 371.

3. *Purna Chandra vs. Indra Chandra* (1921) 49 Cal. 389 : A. I. R. 1922 Cal. 397; *Durga Charan vs. Rajendra Narain* (1922) 36 C. L. J. 467 : A. I. R. 1923 Cal. 57.

4. *Fazal vs. Mangal Das* (1922) 46 Bom. 489 : 66 I. C. 726 : 23 Bom. L. R. 1144 : A. I. R. 1922 Bom. 303.

5. *Fischer vs. Bell* 91 Ind. 243; *Brown vs. Eatan* 21 Minu 409; *Dickerman vs. Ashtan* 1.d. 538.

6. *Boorman vs. Brawn* (1842) 114 E. R. 603 : 61 R. R. 287.

principal.¹ The broker has no right to act in his own name. He must act in the name of his principal except when he is acting for undisclosed principal or where the trade usages permit his acting in his own name.² He has implied authority to act according to the usages, rules, and regulations of the market in which he deals unless such usages, rules and regulations are illegal or unreasonable or alter the intrinsic nature of the contract of agency.³ Where the principal is disclosed there is no implied authority to receive payment.⁴ The broker has no authority to rescind or make variations in the terms of the contract made by him⁵ nor he has power to delegate his business.⁶ He has implied authority to close his account with principal but not to close part of it only, if the principal fails to pay the differences.⁷

Rights of a broker.

The commission of the broker is called brokerage. It is usually a percentage or commission^I on the value of the goods bought or sold.

^I Right of remuneration.

He is entitled to his commission when he has brought together the buyer and the seller. If the contract of sale is affected he has earned his remuneration. It is not necessary that the sale should have actually taken place.⁸ The general principle is laid down in *Green Vs. Bartlett*⁹ that, if the relation of buyer and seller is really brought about by the act of the agent, he will be entitled to his commission though the sale should not in fact take place. The principle was thoroughly discussed in a Bombay case¹⁰ where an agent had been employed to arrange for the purchase of certain plots of land, it was held that, if during

When is he entitled to his commission?

1. *Durga Charan vs. Rajendra* A. I. R. 1923 Cal. 57 : 36 C. L. J. 467 : 77 I. C. 558.

2. *Kishan Chand vs. Khuda Bux* (1921) 60 I. C. 727 see also *Jet Mal vs. Ram Gopal* (1923) 50 Cal. 12.

3. *Pollock vs. Stable* 12 Q. B. 765; *Robinson vs. Mallitt* L. R. 7 H. L. 802; *Beckpuson vs. Hamblett* (1901) 2 K. B. 73.

4. *Linck vs. Jameson* (1886) 2 T. L. R. 206; *Cambell vs. Hassel* (1816) 171 E. R. 457.

5. *Xenos vs. Wickham* (1866) 149 R. R. 467 : 2 H. L. 296 (Rescission of contract by broker).

6. *Cockran vs. Iram* (1814) 105 E. R. 393 : 15 R. R. 257.

7. *Pearson vs. Scott* 9 Ch. D. 198 : *Blackburn vs. Mason* 68 L. T. 510; *C. A. Anderson vs. Sutherland* 13 T. L. R. 163.

8. *Roopji & Sons vs. Dyer Meaken & Co.* 1930 A. L. J. 673 : 124 I. C. 35, see also *Burchell vs. Gowrie* (1910) A. C. 614.

9. (1863) 143 E. R. 613 : 135 R. R. 868.

10. *Municipal Corporation of Bombay vs. Moltai Bai* 20 Bom. 124; *Liladhar vs. Mathura Das* 36 Bom. L. R. 119.

the time that the broker was negotiating with the vendor, the latter was induced to consent to the sale, the broker was entitled to his brokerage. It was not material to enquire what operated on the mind of the vendor, whether it was the advice of friends or knowledge that his land could be acquired compulsorily or the pursuasion of the broker. It was sufficient to support the broker's claim if the vendor's acceptance of the terms was brought about during his intervention and the fact that the Municipal Commissioner stepped in at the last moment and himself actually struck the bargain, did not deprive the broker of his brokerage. It was sufficient that he had induced in the vendor, the contracting mind, and the willingness to open the negotiation upon a reasonable basis even though a change or modification of the terms of the contract is made by the buyer and seller without his intervention. He must procure a willing and able seller or purchaser¹ or in the case of a loan, find the person willing to advance the money.² The fact that afterwards either owing to the caprice of the lender or the infirmity of the title, the bargain is not put through will not derogate from the agent's right to commission.³ Where an agent is employed to sell certain property at a given price and the agent succeeds in finding a purchaser at the stipulated price, but the principal declines to sell, the agent is entitled to his remuneration.⁴ Where the agent has been unsuccessful in putting the transaction through, he cannot even sue on the basis of quantum meruit, for instance, if commission on the sale of a house is payable only on a completed sale⁵ brokerage is not payable for efforts or attempts howsoever praiseworthy, if they were not sufficient cause of the result contemplated.⁶ In determining what constitutes

1. Farid Baksh vs. Hargu Lal Singh 1936 A. L. J. 1163; Stakes vs. Sundernath (1898) 22 Bom. 540.

2. Elias vs. Govind (1903) 30 Cal. 202.

3. Fourcar & Co vs. M. C. T. Mudaliar (1924) 2 Ran. 45 : 79 I. C. 750; A. I. R. 1924 Ran. 232; Elias vs. Govind (1902) 30 Cal. 202 : 7 C. W. N. 297; K. C. Mehta vs. Cassimbhai (1922) 24 Bom. L. R. 847 : A. I. R. 1922 Bom. 433; 75 I. C. 193; Nandlal vs. Gurupad (1924) 51 Cal. 588 : A. I. R. 1924 Cal. 733; Raghunandan Lal vs. Man Mohan Dass 76 I. C. 333 (Cal.) for English cases see Bray vs. Chandler (1856) 139 E. R. 1553 : 107 R. R. 479; Burchill vs. Gowrie (1910) A. C. 614.

4. P. A. Martyrose vs. C. A. E. Courjon 14 I. C. 981 (Cal.)

5. Ayyamah Chetty vs. P. K. Subramania Iyer (1923) 45 M. L. J. 409; Satchidananda vs. Nitya Nath (1923) 50 Cal. 978 : A. I. R. 1924 Cal. 517 : 79 I. C. 287. but see Simpson vs. Camb (1856) E. R. 1213 : 104 R. R. 806; M. W. N. 675 : 18 L. W. 560; 76 I. C. 756 : A. I. R. 1924 Mad. 212.

6. Seth Sapurji vs. Sheo Raj Singh 1899 A. W. N. 68 : 1900 A. W. N. 43; Zeimer vs. Anti Sell 75 Cal. 509; Shanklin vs. Hall 100 Cal. 26; Ayers vs. Thanas 116 Cal. 140.

completion the following questions usually arise. (a) What did the broker undertake to do? (b) Has he completed that undertaking within the time and upon the terms agreed upon? (c) If not, is the default attributable to his own act or omission or to that of the principal. Where the principal refuses to complete a transaction, without sufficient reasons, the agent will be entitled to damages.¹ In *Vulcan Car agency Ltd., Vs. Fiat Motors Ltd.*² it was held that the agent was entitled to a commission where he had procured order for motor cars which were accepted by the Fiat Motors who were unable to execute them owing to the outbreak of war.

Unless the principal has agreed to give a broker the exclusive authority to sell, he may employ as many brokers to sell the same property as he likes.³ A party cannot, by employing another broker in the midst of negotiations, however innocently, deprive the broker who brought the parties together of his commission. If the negotiations carried on by the broker have completely ceased and have been abandoned the agency of the broker ceases too, and with it his right to claim remuneration. The test in such cases is whether the work of the broker who claims brokerage is effective or sufficient cause of the completion of the transaction. It is not sufficient to show that the transaction would not have been entered into but for the broker's services, if the transaction resulted therefrom only as a casual or remote consequence. Where there are several brokers working for the same party at the same time, the broker who is entitled to his remuneration is not necessarily the one who has first introduced business, but the broker whose work is the effective cause of the completion of the transaction, not the *causa sine qua non*, but the *causa causans*, of the completion of the transaction.⁴ The matter was also fully discussed in *Vasauji Moolji Vs. Karsarji Tejpal*.⁵ The facts were that the defendant em-

Case where several brokers are employed during the course of negotiation.

1. *Anna Swami vs. Zemindar of Aya Kudi* (1910) M. W. N. 199 : 6 I. C. 740 *Mehta vs. Cassimbhai* (1922) 24 Bom. L. R. 847 : 75 I. C. 193 : A. I. R. 1922 Bom. 433 see also *Inchibald vs. Western Nilgherry Co.* (1864) 144 E. R. 203 : 142 R. R. 663; *Twiner vs. Gold Smith* (1891) 1 Q. B. 544; *Reigate vs. Union Mfg. Co.* (1918) 1 K. B. 592; *Trallope vs. Martyn Bros.* (1934) 50 T. L. R. 228.

2. (1915) 32 T. L. R. 73.

3. *Tinges vs. Moole* 25 Mad. 480 *Meclave vs. Paine* 10 Am. Rep. 431; *Deval vs. Moody* 24 Tex. Civ. app. 627; *Smith vs. Favler* 57 Tex. Civ. app. 356.

4. *Liladhar Chatrabhuj vs. Mathura Dass Gokal Das* 36 Bom. L. R. 119; *Mehta vs. Kasimbhai* (1922) 24 Bom. L. R. 847; *Wilkinson vs. Martin* (1837) 8 C. & P 1.

5. 52 Bom. I. L. R. 627 It was based on (1895) 20 Bom. 124, (1863) 14 C & B (N. S.) 681. (1875) 31 L. T. 731; on appeal (1876) 33 L. T. 584 & (1878) 39 L. T. 253.

ployed the plaintiff to find a party willing to advance to him rupees four lacs on a mortgage of his three properties. The plaintiff negotiated with a bank, who were agreeable to lend upon forty percent of the value of the properties at nine percent interest. The plaintiff communicated the bank's proposal to the defendant, but negotiations did not materialize at that time. About three months later, the defendant borrowed through another broker Rs. 1,10,000/- from the same bank on a mortgage of one of his properties. The plaintiff sued to recover the amount of his brokerage: Held, that the plaintiff was entitled to recover the brokerage. The main office of a loan broker is to bring together the borrower and the lender who are willing to open negotiations on a reasonable basis and when he has done that, he has done all that is necessary for him to do and earn his commission. All that the plaintiff was employed to do was to find a party who was willing to advance money to the defendant and when once he had put it in defendant's power to obtain loan, he had done all that his appointment necessitated. Where several brokers are employed to sell the same property, the sale of the property either by the principal in person or by any one of the brokers, operates, at once to terminate the authority of all the brokers although they had no notice of such sale.¹ Where two or more persons are employed there is no implied contract to pay more than one commission and it, therefore, becomes necessary to lay down a rule for determining which one of the different possible claimants is entitled to the brokerage. Where several brokers have endeavoured to bring about a sale which is finally consummated, it may happen that each has contributed something without which the result would not have been reached. One may have found a customer who otherwise would not have been found and yet the customer may refuse to enter into the bargain through him and another broker may succeed in concluding the bargain where the first has failed. In such a case, in the absence of any special contract, that one only is entitled to commission whose services were really the effective cause of bringing about the sale.² The principal should remain neutral and must not knowingly permit, much less aid in or connive at the appropriation by one man of the rewards

1. *Abern vs. Baker* 34 Minn 98; *White vs. Bentan* 121 Iowa 354; *Smith vs. Favler* 57 Tex Civ. app. 356.

2. *White Canli vs. Bacon* 170 Mass 479; *Stone vs. Ferry* 144 Ill. App 191, *Crutchfield vs. Webster* 310 Kla. 142.

of what was really another's effort.¹ If he allows it to be done he is responsible to the broker who is thus deprived of his commission by his fault.²

Commission is generally agreed between the broker and his principal. Even in cases where the broker fails to prove the rate of commission agreed upon, the court may award reasonable commission, provided it is satisfied that he did the work.³ The claim of quantum meruit arises only upon a promise to be implied from a request by the defendant to the plaintiff to perform services for him or from the acceptance of such services as plaintiff rendered so as to imply a promise to pay for the same.⁴ In the absence of specific contract, the right to remuneration will be governed by the usage or custom of the particular trade.⁵ An agent is not entitled to remuneration, if he is guilty of misconduct in the business of agency.⁶ Thus where an agent for sale takes a secret commission from the other party, he loses his right to commission from the principal and is further liable to account for the secret profit.⁷ But if an agent retains discounts received in the bonafide belief that he may do so, he will not forfeit his remuneration.⁸ An agent cannot by acting as agent for the principal and the other contracting party get remuneration from both without the knowledge of the principal.⁹ In certain trades, however, it is usually the practice for a broker to get commission from both the parties. In such cases there can be no misconduct.

Amount of remuneration.

The broker must find the purchaser or lender within the time fixed and where no time is fixed, within a

The element of time in the business of the broker.

1. Breman vs. Roach 47 Mo. app. 290; Holland vs. Vinson 124 Mo. app. 417; Wright vs. Brown 68 Mo. app. 577; Gerhart Co. vs. Margorie Co. 144 Mo. app. 620.

2. Hogan vs. Slade 98 Mo. app. 44; Woodwells 103 Mich. 320; Beongher vs. Clark 81 Kan. 250; Tunning vs. Trummer 52 Ore. 149.

3. Khurshed Alam vs. Asa Ram A. I. R. 1933 Lah. 784:146 I. C. 761; P. A. Martyrose vs. C. A. E. Ceurjin 14 I. C. 981.

4. Liladhar vs. Mathura Das 36 Bom. L. R. 119; Barnett vs. Isaacson (1888) 4 T. L. R. 645.

5. Satchidanand Dutt vs. Nritya Nath (1923) 50 Cal. 878; A. I. R. 1924 Cal. 517:27 C. W. N. 1007:79 I. C. 287.

6. Andrews vs. Ramsay (1903) 2 K. B. 635; Hariballabh Das vs. Bai Jiwanji (1902) 26 Bom. 689; Joachinson vs. Moghjee (1909) 34 Bom. 292:11 Bom. L. R. 779:3 I. C. 801.

7. Andrews vs. Ramsay (1903) 2 K. B. 635; Stubbs vs. Slater (1910) 1 Ch. 632 Joachinson vs. Meghjee (1909) 34 Bom. 292:3 I. C. 801.

8. Hippisby vs. Knee Bros. (1905) 1 K. B. 1.

9. Fullwood vs. Hurby (1928) 1 K. B. 498; Harrods vs. Lemon (1931) 47 T. L. R. 248. A broker closing account is an exception to the rule see Christo Predes vs. Ferry (1924) A. C. 566.

reasonable time¹ and if he fails to do so, he is not entitled to his commission even if a person of his procuring becomes later on purchaser or lender² unless the delay was due to some fault of the principal³ or unless the principal waives it.⁴ But if the purchaser or lender is found within the time prescribed it is immaterial that the actual sale or loan was not consummated within such time but afterwards.⁵ It is the duty of the broker to notify to the principal as soon as the purchaser or lender is found and if he fails to do so, and the principal effects the sale or contracts a loan with another, he cannot recover compensation. He cannot complain in such a case if the principal in good faith and without notice pays the commission to another broker who subsequently sells to the same purchaser for the same price.⁶

II. Right of remuneration in wagering contract.

Wagers are only void and therefore collateral transactions will not be affected.⁷ The word 'void' in section 30 of the Contract Act does not mean unlawful. It would therefore follow that a broker may sue for his commission in respect of a wagering transaction⁸ and an agent may recover from the principal losses incurred by him over wagers on behalf of his principal.⁹ But where an agent knows the acts to be unlawful or where the acts are criminal in nature, the agent has no right to be indemnified whether by an express contract of indemnity or by an implied contract.¹⁰

III. Right of indemnity

The broker is entitled to be re-imbursed for all costs and expenses which he has incurred in good faith

1. Hyer vs. Duffy 24 L. R. A. 339; Hurst vs. Williams 102 S. W. 1176 Harris vs. Moore, 134 Iowa 704.

2. Bean Champ vs. Higgins 20 Mo. App. 514. Fultr vs. Wimer 34 Kan. 576; Watson vs. Books 11 Ore. 271; Brown vs. Mason 155 Cal. 155; Rapes vs. Rosinfield 145 Cal. 671; Zeimer vs. Antisell 75 Cal. 509.

3. 20 Mo. App. 514; 34 Kan. 576; 11 Ore. 271.

4. Dyer vs. Duffy 24 L. R. A. 339, 134 Iowa 704.

5. Goffe vs. Gibson 18 Mo. App. 1; Wilson vs. Sturges 71 Cal. 226.

6. Tinges vs. Moale 90 Am. Dec. 73; Gilbert vs. Mecullough 146 Iowa 333 Johnson Brotyers vs. Wright 124 Iowa 61; Gibbons vs. Sherwin 28 Neb. 146.

7. Gulam vs. Padamsi (1923) Nag. 48 : 69 I. C. 186.

8. Jagat Narain vs. Sri Krishan (1910) 33 All. 219 Bisheshar vs. Jwala Pd. (1914) 36 All. 426; Daya Ram vs. Murlidhar (1927) 48 All. 926 : 25 A. L. J. 693 : 102 I. C. 605 : A. I. R. 1927 All. 823.

9. Pirthi Singh vs. Matu Ram A. I. R. 1932 Lah. 356 : 138 I. C. 241; Chowdhri Bidhi Chand vs. Kachhu Mal (1923) 45 All. 503 : 73 I. C. 477 : A. I. R. 1923 All. 585; Arjan Das vs. Walaiti Ram A. I. R. 1928 Lah. 420 : 108 I. C. 58. Ally Moolla Industrial Corporation vs. Esmail A. I. R. 1925 Ran. 284 : 90 I. C. 676 : Chekka vs. Gajjila (1904) 14 M. L. J. 326; Pringle vs. Jafar Khan (1883) 5 All. 443.

10. Josephs vs. Pebrer (1825) 107 E. R. 870.

and to be indemnified against all losses or liabilities to which he has been legally subjected while acting as such in the ordinary and proper course of his business by the authority and for the benefit of his principal and which were not the result of his own misconduct or neglect¹ but the rule does not extend to needless or illegal expenses.²

As the broker is not generally entrusted with possession of the property to be sold, no question of lien arises,³ except in those cases where the broker is granted an interest in property in lieu of his commission or where the proceeds of the property are to pass through his hands.⁴ In the latter case he has a special lien on such proceeds for his commission and expenses which he can deduct while accounting for such proceeds to the principal in the same way as any other agent could do.⁵

IV. Right of lien.

Such rights and liabilities accrue in the following cases:—

V. Right of action and personal liability of broker.

(a) Where a broker is acting for an undisclosed principal he has a right of action and is also personally liable.⁶

(b) When he is acting for a principal who cannot be sued e. g. a minor, a foreign sovereign or ambassador.⁷

(c) Where he has paid money for the principal under a mistake of fact or owing to fraud having been practised upon him.⁸

(d) Where the contract is made by an agent for the sale or purchase of goods for a merchant, resident abroad.⁹

(e) In case of bought and sold notes:—

In *Gubhoy Vs. Avetoon*¹⁰ where a “sold note”

1. *Lacy vs. Hill* L. R. 18 Eq. 182; *Searing vs. Butter* 69 Ill 575 *Corral vs. Lemmons* 264 Mo. App. 655.

2. *Bayley vs. Wilkins* 7 C. B. 886; *Lacy vs. Hill* L. R. 18 Eq. 182; *Ellis vs. Pond* 1 Q. B. D. 426.

3. *Barry vs. Moninger* 46 Md. 59.

4. *Hape vs. Gledinning* (1911) A. C. 419; *Snook vs. Davidson* 2 Camp 218; *Fisher vs. Smith* 4 App. Case 1.

5. *Re London Grove Finance Co.* (1902) 2 Ch. 416.

6. *Pati Ram vs. Kankanorrah Co.* (1915) 42 Cal. 1050; 19 C. W. N. 623; 31 I. C. 607; *Nandlal vs. Guru Pd.* (1924) 51 Cal. 588; 81 I. C. 721; A. I. R. 1924 Cal. 733.

7. *Ram Chand vs. Ismail* (1928) Sindh 189; 113 I. C. 345; *Abdul Ali vs. Goldstein* (1910) 4 I. C. 902; (1910) 43 P. R.; *Raghubir Dayal vs. Firm Pyare Lal* A. I. R. 1933 Lah. 93; 145 I. C. 178; *Mallhu vs. Meghraj* (1920) 55 I. C. 992 (Lah).

8. *Colonial Bank vs. Exchange Bank* (1885) 11 A. C. 84; *Halt vs. Ely* (1853) 118 E. R. 634; 93 R. R. 398.

9. See 230 Contract Act.

10. (1890) 17 Cal. 449.

mentioned the name of the principal, but it was simply signed as broker it was held that the broker was personally liable.

Where a broker enters into a transaction and gives a 'bought' or 'sold' note, if the expression used in the note happens to be, "Bought for you from my principal" or "Sold for you to my principal" it has been held that the broker is personally liable but if the expression used is "Bought of you for my principal" or "Sold to you for my principal" then it is said that the broker acts only as an intermediary and does not make himself personally liable.¹

(f) Where the contract expressly provides:—

A difficult question sometimes arises as to whether a broker by signing a contract makes himself personally liable or only binds the principal for whom he is acting. It depends upon the wording in the contract whether the liability is that of the agent or the principal.² It is practice among metal merchants at Mirzapur and Benares to get all contracts written by the broker in a book called *Dalal Bahi* so as to fasten the liability on the broker in case the principal should deny his liability.

(g) A broker, untruly representing himself to be the authorized agent of another and thereby inducing a third person to deal with him as such is personally liable, if his alleged employer does not ratify his act,³ for all losses which the third party might have suffered. This rule applies to total absence of authority as well as to misrepresentation about the extent of the authority of the agent. In *Ganpat Vs. Sarju*⁴ where the agent untruly represented that he had authority to sell at a particular price he was held liable under this rule. The good faith of the agent makes no difference.⁵ In this connection it is profitable to

1. *Patti Ram Banerjee vs. Kankinara Co. Ltd.* (1915) 42 Cal. 1050:19 C. W. N. 623:31 I. C. 607 cf *Gadd vs. Harghtar* (1876) 1 Ex. D. 357.

2. *Associated Portland Cement Manufacturers vs. Ashtar* (1915) 2 K. B. 1; *Kunkar Coal Co. vs. Stone & Ralfe Co.* (1926) A. C. 414 *Samuel vs. Whetherby* (1908) 1 K. B. 184 (intention to contract only as agent should be quite clear from the contract) *Paquine vs. Bean Clerk* (1906) A. C. 148 (where both existence and name of the principal disclosed, agent not as a rule personally liable) *Champman vs. Smith* (1907) 2 Ch. 97. (agent liable personally on deeds executed in his own name).

3. See 235 of Indian Contract Act.

4. (1911) 34 All. 168; 9 A. L. J. 8:13 I. C. 94 *Firbank vs. Humphreys* (1889) 18 Q. B. D. 54.

5. *Starkey vs. Bank of England* (1903) A. C. 114; *Oliver vs. Bank of England* (1902) 1 Ch. 610; *Younge vs. Toyinbee* (1910) 1 K. B. 215; *Simmons vs. Liberal Opinion Ltd.* (1911) 1 K. B. 966 (authority which had ceased without agents knowledge); *British Mission Gazette vs. Associated Newspapers* (1933) 2 K. B. 616.

examine the doctrine of Ratification.

A person on whose behalf an act has been done by another acting as agent without any authority or in excess of his authority, can ratify such act so as to make the act of the agent valid and as effectual as if it had been done in pursuance of prior and proper authority. It is called *ex-post facto* agency or agency arising after the event. The doctrine is contained in section 196 of the Indian Contract Act:—

Ratification and its nature.

“Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or disown such acts. If he ratify them the same effects would follow as if they had been performed by his authority.”

(1) Ratification must be by the alleged principal for whom the act is done. It is essential that there should be a principal. If the agent does something for himself or for a third person or for a fictitious person ratification can not make the act valid.

Ingredients of Ratification.

Boven L. J. Said¹

“A man can ratify that which purports to be done for him but he cannot ratify a thing which purports to be done for somebody else.”

The leading case on the subject is *Keighley Vs. Durant*.² The facts were as follows:—

Keighley Co. authorized one corn merchant Roberts to buy wheat at a certain price on a joint account for himself and the company. Robert failed to buy at the authorized price and later on he contracted with Durant to buy at higher price without any authority. He made the contract in his own name; but he intended it to be in the joint account of the Company and himself. This intention was not disclosed to Durant. The court decided that the company could not ratify the contract so as to relieve Roberts of his liability. In *Raghava Chari Vs. Parikki*³ the principal had expressly forbidden the agent to buy some land and subsequently the agent bought the land for himself. It was held that the principal cannot claim the land by ratification. It is necessary that the agent should have contracted as agent. The principal might not have been disclosed but some description was necessary to identify him.⁴

1. *Falcke vs. Scottish Imperial Insurance Co.* (1886) 34 Ch. D. 234 at 250.

2. (1901) A. C. 240; *Marsh vs. Joseph* (1897) 1 Ch. 213. *Eastern Construction Co. vs. National Trust Co.* (1914) A. C. 197 *Harrison & Crossfield vs. L. & N. W. Ry. Co.* (1917) 2 K. B. 755.

3. (1916) 30 M. L. J. 497 : (1916) 2 M. W. N. 73 : 34 I. C. 760.

4. *Watson vs. Swann* (1862) 142 E. R. 993 : 132 R. R. 746.

(2) The person ratifying should have been competent to grant the authority to the agent. An act done by an agent for his principal who was minor could not be ratified by the principal on attaining majority as the minor could not have given the authority when the act was done.¹

(3) The person ratifying must be existing when the act ratified was done.

The promoter of a joint stock company which was not yet incorporated entered into a contract for the company. Company could not ratify on incorporation.

Willes J., said,

"Ratification can only be by a person ascertained at the time of the act done—by a person in existence either actually or in contemplation of law."

Again in *Natal Land & Colonization Co. Ltd. Vs. Panline Colliery Syndicate*² Lord Devey said:—

"It is clear that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. But the facts may show that a new contract was made with the company after its incorporation on the terms of the old contract."....."It would be like the case of a man who has attained the age of 21 sought to be charged by ratification with a contract made when he was *en ventre sa mere*."

A agreed to sell goods to three persons who professed to act as agents of a company 'about to be registered.' The company after incorporation used the goods but before the price was paid it went into liquidation. A sued the three purchasers who pleaded that the company alone was liable in as much as it had ratified by using the goods. Held that the acts done before incorporation could not have been ratified and the purchasers were personally liable.³

Now the promoters have begun the practice to insert in contract a clause that the promoter would not be liable as soon as the act is adopted by the company after incorporation and after incorporation if the company does not ratify within a specified period either party is at liberty to end the contract. Still ratification is not possible but the company might cure the defect by the novation of the contract entered into before the incorporation.⁴

1. (cf) *Harper vs. Vigars* (1909) 2 K. B. 549.

2. (1904) A. C. 120

3. (1866) 2 C. P. 174; *Re Empress Engineering Co.* (1880) 16 Ch. D. 125.

4. *Howard vs. Patent Ivory Mfg. Co.* (1888) 38 Ch. D. 156.

(4) The person must ratify with full knowledge of material facts or with the intention to take the risk of any irregularity.

If the principal ratifying is not aware of the irregularities he will not be bound by the contract,¹ but if he ratifies the act of the agent no matter what the irregularities might be he will be bound by the contract.² Where an agent sold his own goods to the principal at a rate higher than the market rate and again the agent purchased himself the goods of the principal at a lower rate and this was going on for a long time and the principal who was receiving periodical accounts raised no objection; it was held that there was no ratification as the principal was unaware of the agent's misconduct.³ The same principle is laid down in section 198 of the Indian Contract Act.—

“No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.”

(5) Acts ratified might be lawful or unlawful but not void or criminal:—

Acts of an agent who is minor can be ratified for a minor can be appointed as agent. Void and illegal acts cannot be ratified⁴ nor can a criminal act be ratified.⁵

(6) The person ratifying must have had the power to do the act which is to be ratified. If the principal could not have authorized the act before it was done, the act cannot be ratified after it was done. A company cannot ratify an act of one of its agents, where such act is ultra vires for the company itself.⁶

(7) The whole act must be ratified and not a portion of it.

The principal cannot ratify a part of the act and refuse the other part of an integral whole.⁷ Of a series of transactions the principal cannot claim by ratification the profits of one transaction without bringing the others into account.

1. *La Banque vs. La Banque* (1887) 13 A. C. 111.

2. *Marsh vs. Joseph* (1897) 1 Ch. 213.

3. *Damodar Das vs. Sheo Ram Das and others* (1907) 29 All. 730.

4. *La Banque vs. La Banque* (1887) 13 A. C. 111; *Hook vs. Haig* (1871) L. R. 6 Ex. 89 App. 99.

5. *Greenwood vs. Martins Bank* (1931) 47 T. L. R. 607. (1932) 48 T. L. R. 601.

6. *Maun vs. Edinburg Northern Tramways* (1893) A. C. 69.

7. *Bank of Australia vs. Meclintock* (1922) 1 A. C. 240.

Section 199 of the Contract Act deals with this principle.

"A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part."

(8) There can be no ratification so as to impose a liability on or prejudice a third party.

Section 200 of the Contract Act runs:—

"An act done by a person on behalf of another without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages or to determining any right or interest of a third person, cannot by ratification, be made to have such effect."

A notice to quit is given by one of two joint receivers without the consent of the other, such notice can not be ratified by the other, so as to give a cause of action against the defaulting tenant.¹ Where an agent not invested with the requisite authority, offered to pay a debt of the principal and the creditor returned the amount on discovering the agent's want of authority it was held that the principal cannot ratify the agent's act and rely on it as a discharge.² Where an agent demands the principal's goods from third party without authority, the principal cannot ratify the act, so as to maintain a suit for conversion.

(9) Ratification may be express or implied:—

Where an agent does an act in excess of his authority but the principal coming to know of it keeps quiet, it would amount to ratification by acquiescence.³ An agent unauthorized made a reference to arbitration and the principal on coming to know of it kept silent, it was held to amount to ratification.⁴ An agent had authority to borrow on land but the agent borrowed on houses and land and the principal who knew of it did not object, it was held that it amounted to ratification.⁵ If a principal takes benefit of a transaction entered into by the agent it has been held to amount to ratification. An agent, without authority, invests money on a mortgage and the principal receives interest out of the mortgage, the principal's conduct may be deemed to amount to ratification.⁶ An agent was speculating in

1. Cassim vs. Eusuff (1916) 23 C. L. J. 453 : 34 I. C. 221.

2. Walter vs. James (1871) 6 Ex. 124.

3. De Bossche vs. Alt (1878) 8 Ch. D. 286.

4. Saturjit vs. Dulhin (1897) 24 Cal. 469.

5. Sultan Mohammad vs. Mohd. Eusuff 1930 Mad. 476 : 122 I. C. 501.
(cf) Valpy vs. Sanders (1848) 136 E. R. 1128 : 75 R. R. 844 : (there should be clear adoptive act) See Lloyds Bank vs. Chartered Bank (1929) 1 K. B. 40.

6. (cf) The Bonita (1871) 5. L. T. 141.

shares but the principal instructed him not to purchase more shares but to sell away the shares already purchased. The agent on the contrary purchased more shares and the principal finding the market falling sold away all the shares. The question arose if the sale of the shares amounted to the ratification of the purchases of the agent. It was held that it did not; the principal was only making the best of a bad situation.¹ A ratification can be revoked before it is communicated.

(10) Ratification must be within a reasonable time. Where an act is to be done within a fixed time no ratification can be made after the expiry of that period. Ratification must be made before the other party has begun performing the contract.²

Duties of a broker.

It is the duty of a broker to contract in the name of the principal subject to any special instructions or usage to the contrary.³ For instance, a broker is authorized to buy wood in the Liverpool market. By the custom of that market a broker, so authorized may buy either in his own name or in the name of his principal without giving his principal notice whether he has bought in his own name or not. Such a custom is not unreasonable and the principal is bound by a contract made in the name of the broker, though he had no notice of the custom or of the fact that the contract was made by the broker in his own name.⁴ Where the principal is not disclosed or where there is trade usage permitting it the agent may act or sue in his own name otherwise he must act in the name of the principal.⁵

I. Duty to contract in the name of the principal.

In all matters the broker is subject to the regulations and usages of the particular market.⁶ In *Solomon Vs. Barker*⁷ where a broker, who according to the custom of the trade was bound to make out an estimate before sale failed to do so and owing to this failure, the goods fetched

II. Broker is subject to the usages of the market.

1. *Kadirsa vs. Ramanatha* (1927) Mad. 478 : 102 I. C. 561 : 1927 M. W. N. 118.

2. *Doe-d-Maun vs. Walters* (1830) 109 E. R. 583 : 34 R. R. 522 : *Dibbins vs. Dibbins* (1896) 2 Ch. 348.

3. *Baring vs. Corrie* 2 B. & A 137.

4. *Cropper vs. Cook* L. R. 3 C P. 194.

5. *Robinson vs. Mallet* (1874) 7 H. L. 802.

6. (1862) 121 R. R. 828 : 2 F & F. 726.

7. *Johnson vs. Kearby* (1908) 2 K. B. 514.

an inadequate price at the sale, it was held that the broker was liable.

III. Duty to inform

He must inform the principal of the actual terms of the contract made on his behalf.¹

IV. Duty to exercise due care.

He must exercise due care and diligence. Like any other agent he is bound to exercise reasonable diligence under section 212 of the Indian Contract Act. He must make a careful estimate of the value of goods which he is entrusted to sell, so that he may not sell them for less than their value.² In case of difficulty he must seek instructions from the principal.³

V. Duty not to deal on his own account.

The broker is not to deal on his own account. An agent cannot sell his own goods to the principal nor buy the principal's property without disclosing the same to the principal.⁴

Willes J., said.⁵

"It is an axiom of law of principal and agent that a broker employed to sell cannot himself become buyer, nor can a broker employed to buy, become himself the seller, without distinct notice to the principal so that the latter may object if he thinks proper; a different rule would give the broker an interest against duty to pass off a bad bargain or inferior goods."

In *Damodar Vs. Sheo Ram*⁶ where an agent employed to buy grain, delivered grain of his own to the principal at a rate higher than the market rate it was held that he must account for the profit. In *Joachinson Vs. Meghjee Vallabhdas*⁷ where an agent for sale purchased the property himself, it was held that the sale was not binding.

VI. Duty to complete the bargain before claiming brokerage.

A broker cannot recover his commission, unless he can show that the conditions of the bargain have been fulfilled. On proof of fulfilment he can recover, otherwise he should fail in toto. There is no room for a claim by way of quantum meruit.⁸ In *Ayya Nuah Chetty Vs.*

1. *Kishan Chand vs. Khuda Bux* (1921) 60 I. C. 727 see also *Jitmull vs. Ram Gopal* (1923) 50 Cal. 12 (Jute market of Calcutta—custom and usages of trade discussed).

2. *Soloman vs. Barker* 2 F & F 726.

3. Section 214 of the Indian Contract Act.

4. *Kallu Ram vs. Churin Ram* A. I. R. 1934 Bom. 86 : 36 Bom. L. R. 68 and also section 215 and 216 of Indian Contract Act.

5. *Mollett vs. Robinson* (1870) 5 C. P. 655. *Armstrong vs. Jackson* (1917) 2 K. B. 822 (sale to principal) *Killy vs. Enderton* (1913) A. C. 191.

6. (1907) 29 All. 730 : (1907) A. W. N. 245.

7. (1909) 34 Bom. 292 : 11 Bom. L. R. 779 : 3 I. C. 801.

8. *Satchida Nand vs. Nritya Nath* (1924) 50 Cal. 878 : (1924) Cal. 517 : 79 I. C. 287 : 27 C. W. N. 1007.

Subramania Iyer¹ it was decided that very clear evidence is necessary in order to entitle a broker to commission on the introduction of a purchaser, even if no sale takes place.

The test to be applied was laid down as follows:-²

"The right to commission did not arise out of the mere fact that agents had introduced a tenant or a purchaser. It was not sufficient to show that the introduction was a *causa sine qua non*. It was necessary to show that the introduction was an efficient cause in bringing about the letting or the sale."

1. (1923) 45 M. L. J. 409 : 76 I. C. 756 : (1924) Mad. 212.

2. Nightingale vs. Parsons (1914) 2 K. B. 621 at page 626.

CHAPTER V.

HUNDI.

The use of hundi is known to India from ancient times. The name is derived from the word the "Hund" meaning to collect. The system was introduced to collect debts and to facilitate credit. If a Calcutta merchant sends goods to Delhi, he can easily collect his dues by drawing a Hundi on the Delhi merchant. It is a very simple medium of currency and strong system of credit. The use of Hundi had existed even in time of Shivaji and Moghul period. Some five hundred years ago there is record that Narasimha Mehta, the first Gujrati poet who belonged to Junagadh drew a Hundi on Seth Shamal Shah of Dwarka. The famous Dilwara temples on mount Abu were built by money raised on Hundi by Vastupal Tejpal on the Nagar Seth of Ahmedabad. The forms prescribed for different kinds of Hundis have become fixed and are being used for hundreds of years. How the system of Hundi developed is beyond the memory of man. The Hundis used today are the same which were used even in medieval ages. They had reached their perfection centuries ago. The people dealing in Hundis were called *sharrafs*. They were persons of very high credit and established financial position. The dishonour of Hundi was regarded as an act of insolvency on the part of the merchant. The system of Hundi is purely the outcome of a horde of usages prevalent in India for a very long time. They are universally acknowledged and respected.

At the time of the passing of the Negotiable Instruments Act there were two schools of thought; one favoured the assimilation of the usages about Hundis within the Indian Negotiable Instruments Act and the other did not want to disturb the established usages and favoured the exclusion of Hundis from the Act altogether. The legislature adopted the middle course of saving local usages from the operation of the Act. The following extract from the report of the select committee would explain the policy adopted by the legislature:—

"We have carefully considered the arguments urged on the one side by the Learned Chief Justice of Bengal and the Bank of Bengal for the immediate application of the measure in its entirety to hundis and on the other side by the Government of the Punjab

for the total exclusion of hundis from any part of the measure. We have come to the conclusion, that the Bill should in this respect be left substantially as it stands. Admitting with the Chief Justice, that the one main principle of Indian codification is to reconcile and assimilate, as far as possible, the Native and European law on each subject, we would point out, that this principle must be applied, so as to produce as little friction as possible, and we feel assured, that any sudden abolition of the numerous local usages (there is no general custom) as to Hundis, uncertain and undefined as they often are, would cause much and justifiable dissatisfaction among native bankers and merchants in certain parts of the country. But we believe that the effect of the Bill, if passed with the saving of the local usages in question, will be, not as the Chief Justice fears, to stereotype and perpetuate these usages, but to induce the native mercantile community gradually to discard them for the corresponding rules contained in the Bill. The desirable uniformity of mercantile usages will thus be brought about without any risk of causing hardship to native bankers and merchants. How long this change will take, is of course, impossible to prophesy. But the Bank of Bengal has supplied evidence that the native usages as to negotiable paper have of recent years been greatly changing, and that the tendency is to assimilate them more and more to the European custom." Government of India Gazette 1879, part V. page 75.

Thus it would be seen that in section 1 was added a saving clause "nothing herein contained in the Act effects any local usage relating to any instrument in any oriental language." Hundi is governed by usages, but where none exists it is dealt with under the Act as if it is a bill of exchange.¹

Indian merchants had realised the advantages of Hundi very clearly and its working was well understood long before the introduction of the Negotiable Instruments. When the means of communication in India were very difficult and it was highly unsafe to send money from one place to another the system of Hundi was regarded as a very convenient way of dealing and it retains its usefulness even today. The advantages of Hundi are as follows:—

The advantages
of Hundi.

1. It helps the collection and payment of debts without the coins being carried from one place to another. The cost of carriage as well as the risk of loss attending the transit of valuables is avoided.

2. It helps to raise money on loan. A person can draw a Hundi upon himself and negotiate it in the open market and thus can immediately procure money and pay it after the expiry of the period prescribed in the Hundi. Also the creditor can draw a Hundi against his debtor and

1. 29 Bom. 88.

raise money on it without waiting for the actual payment by the debtor.

3. It facilitates credit.
4. It is negotiable.
5. If the Hundi is dishonoured an action lies on it.
6. It affords the merchant an opportunity to get immediate credit and gain time for payment till his goods are sold.

Component parts
of a Hundi.

1. *Drawer or Likhnewala*: The full name and address of the drawer is given in the body of the Hundi; while in an English bill of exchange the name and address of the drawer are written at the right top corner. The signature of the drawer is essential to the making of the Hundi. He is responsible till the Hundi is accepted before maturity. Where the bill is accepted before maturity, the acceptor takes the place of the drawer and the drawer becomes a surety for the acceptor.

2. *Drawee or Uparwala*: The name and address of the drawee is written in the body of the Hundi as well as on its back. In an English bill of exchange it is written only on the left hand corner below. It is to the drawee that the Hundi is presented for acceptance before the date of maturity. The drawee might be one single individual, a company or an association of individuals whether incorporated or not.

3. *Payee or Rakhkhewala*: He is the person to whom money is to be paid. It may be a third person or the drawer himself. It is usual to make the Hundi payable either to a specified person or to a Shah *i. e.* a person of known worth and substance in the market.

4. *Amount of money*: It is written at almost five places in a Hundi. In the body are written the amount and its half. On the back the amount is written inside a square and below it half the amount and four times the amount are written in letters. These contrivances are adopted to make the chances of forgery as rare as possible.

5. *Period*: In Darshani Hundi no period is written but in Muddati Hundi the period usually given is 30, 60, 90 days and so on to which are added the days of grace. This period is counted either "after sight" or "after date." "After sight" means the date of presentation and "after date" means the date of writing. In Hundi the date given is the Indian date and follows the Indian calendar and not the British calendar.

6. Place of payment: It is usually not written in a Hundi but the drawer, if he thinks proper may prescribe a place for payment.

7. Nishani: It appertains to postings in the ledger. If it contains no Nishani, the amount is to be written to the debit of the drawer. If, however the Hundi is written for some commission agent, his name is written on the top and in that case the posting is made in the ledger of that person.

8. Stamp: Hundis executed in British India must be stamped before or at the time they are signed. No instrument chargeable with stamp duty shall be admitted in evidence for any purpose or shall be acted upon by any court or officer, if not duly stamped. The amount of the stamp which is to be fixed on the Hundi is prescribed by the Indian Stamp Act. A Darshani Hundi, however is an exception and requires no stamp.

These essential features of a Hundi are almost fixed. The wordings of the various types of Hundis have also become conventional and are very rarely varied. The characteristics of a Hundi resemble almost all the characteristics of a bill of exchange. The two are similar though not identical. It is therefore that the Hundi has been defined as a bill of exchange in oriental language. The bill of exchange might be taken to be the genus of which the Hundi is only a species. A bill of exchange is an innovation of the West but it is surprising how a similar type of instrument grew up in India with characteristics so similar that it might be included in the general class of bill of exchange for the purposes of the rules by which it might be governed under Indian Negotiable Instruments Act which is based on the English Negotiable Instruments Act.

Thus it will be seen that hundi is a bill of exchange and is governed by all the rules about it except where there is a local usage to the contrary.

Kinds of Hundi.

From the point of view of period the hundi might be divided into Darshani and Muddati. Darshani hundi is one payable at sight. When the demand for the hundi is more in the market it is sold at *Badha* (premium), when the demand is less it is sold at discount or *Batta*. Below is given the sample of a Darshani Hundi.

Darshani Hundi.

Form of
Darshani Hundi.

Shri Ganesh Ji Sahai.

No. 621.

Nishani Hamare Gharu Khate Marna.

Dastkhat: Ram Krishna Ram Chandra

ke hundi Likhe Mojab Sikar Dena.

Sidh Shree Calcutta Bandar Subhasthanik Bhai
Ram Lal Ram Nath yatha yogya Shri Cawnpur se Likhi
Ram Krishna Ram Chandra ki Jai Gopal Banchana. Age
hundi nag Ek 1,000 Akshare rupae ek Hazar ke Neme
rupaye panch sau ka duna pura, yahan rakhe shah Shri
Prem Nath Rang Nath pas Miti Sawan Sudi Ashtami so
turat darshani shah jog rupya hundi chalan ka dena. Miti
Sawan Sudi Ashtami Sambat 1994.

BACK OF THE HUNDI.

Rs. 1,000/-

Neme Neme Rupiya Dhai Sau ka Chauguna
Pura Ek Hazar Kar Dena.

Bhai Ram Lal Ram Nath Jogya.

300 Circular Road,

Calcutta.

TRANSLATION.

May the sacred Ganesh Bless you.

No. 621.

Nishani—Put in the ledger of Hamare Gharu khata.

Signed—Ram Krishna Ram Chandra—Please pay
up the hundi as directed.

Addressed to Ram Lal Ram Nath of the blessed
Calcutta port—courteous greetings from Ram Krishna
Ram Chandra of Cawnpur. Drafted this hundi against you
for Rs. 1,000/- in letters rupees one thousand whose half
is equal to Rs. 500/-. Please pay double of that. Money
paid to us by Mr. Prem Nath Rang Nath on Sawan Sudi
Ashtami. The amount be paid on sight in current coins
according to the market practices governing hundi to a
shah or banker. Dated Sawan sudi Ashtami Sambat
1994.

On the back of the Hundi.

Rs. 1,000/-.

Its one fourth is rupees two hundred and fifty whose four times is rupees one thousand.

Address:—

Ram Lal Ram Nath,
300 Circular Road,
Calcutta.

It should be noted that half, and one fourth of the amount are written only to avoid alteration and forgery.

Such a hundi is not payable at sight but after a specified period of time called Muddat. Sometimes traders raise loan on Muddati hundi. If A takes a loan for Rs. 1,000/- from B at 12 p. c. p. a. for 3 months. A will take Rs. 970/- and will sign the hundi for Rs. 1,000/-. It means that the interest has been charged in advance. The period is usually 21, 31 or 61 or 91 days. In Ludhiana and Jullundhar a hundi is usually drawn for 61 days and is called "*Ikahat Miti Hundi*." In Amritsar the period is usually 91 days. There is no hard and fast rule. The period sometimes is even 180 or 360 days.

Muddati or Miadi
Hundi.

Stamp.

Form of Muddati
Hundi.

Shri Ganesh Ji Sahai.

Sidh Shri Bombay Bandar Subhasthanik Shri Kunj Behari Lal Ramji Jogya Jaipur se likhi Gopal Ji Shiamji ka pranam Banchana. Age hundi nag 1 Rs. 1,000/- Akshare rupaya ek hazar ki Neme rupaya Panch San ka Duna Pura Yahan Rakhe Bhai Shri Mohan Hari Mohan pas Miti Asoj Badi 8 (Ashtami) se din Ektis pichhe shah jog rupaya Hundi chalan ka dena. Miti Asoj Badi 8 (Ashtami) Sambat 1994.

TRANSLATION.

Stamp.

Blessings from Sacred Ganesh.

Addressed to Kunj Bihari Lal Ramji of Bombay Harbour. Greetings from Gopal Ji Shiam Ji of Jaipur. Drafted this hundi against you for Rs. 1,000/- whose half

amounts to Rs. 500/-. Money has been paid to us here by Shri Mohan Hari Mohan today on Asoj Badi 8. Please pay up the hundi in current coins and according to market practices to a shah or Banker after 31 days from today dated Asoj Badi 8 Sambat 1994.

A bill of exchange is similar to a hundi in form.

Form of Bill of exchange.

No. 1.

Rs. 1,000/-.

Calcutta 10th. September 1929.

Three months after sight, pay Mr. Laxmi Chand or order one thousand rupees, value received.

Shri Gopal.

To

Laxmi Chand,
7 Central Avenue,
Calcutta.

While we have considered the classification of Hundi from the point of view of time Hundis have variously been classified from the point of view of person. They are Shah Jog, Nam Jog, Nishan Jog, Dhani Jog and Farman Jog. There is another kind of Hundi called Jokhami Hundi which is a class by itself. The Hundis classified from the point of view of the person to whom it is payable might both be a Darshani as well as a Miadi Hundi.

Shah Jog Hundi.

A shah jog hundi is generally to be found in the following form.

HUNDI

Stamp

4½ Shri Ganeshji helps.

To Bhai Keshrichand Suganchand of the good and auspicious and prosperous place Calcutta by Keshrichand Suganchand of the port of Calcutta whose compliments please accept. Further we draw one hundi here for Rs. 400/- (in words) four hundred rupees full double of two hundred rupees, the half thereof, in favour of Baldeo Dass Asharamji. Please pay after 51 fifty one days from Miti Sawan 1 Sud 5. Thursday value in Currency Coin to the Shah jog (respectable holder). Miti Sawan 1, Sud 5, S. 1986 Thursday.

Sd.

Rs. 400

This was the form of a Shah jog Hundi appearing in a Bombay case *Ram Prasad Vs. Sri Niwas* 27 Bom. L. R. 1122. In an Allahabad case¹ the Shah jog Hundi was in the following form:—

“To—Bhai Mohan Lal of good and prosperous place of Aligarh from Mohan Lal Babu Lal of Aligarh whose compliments please accept. We draw, one Hundi on ourselves for Rs. 1000/- in words one thousand double of Rs. 500/- payable after 60 days from the date. Here deposited with Bhai Mangal Sen Jaidev Prasad. Please pay to a shah after making usual enquiries in accordance with the usage of the market.”

It is like a Shah Jog Hundi except that in the place of Shah the name of the payee is accepted. Such a bill is payable to that person or to his order. Sometimes Hundi is covered by a letter giving full description of the payee and in such a case payment can be made only to him and no endorsement can be made if the payee is not known to the drawee. Two attesting witnesses are secured at the time of payment.²

When the words Nishan Jog appear in a Hundi it is payable only to the person who presents it. Similarly *Dekhanhar* Hundi is payable to bearer or whosoever presents it.

It is Hundi payable to a Dhani. The word Dhani means owner. It is payable to any owner, holder or bearer. Dhani Jog Hundi has been held to be a Negotiable Instrument payable to the bearer.³

The following is the form of Hundi which occurred in a case:—⁴

“The account of Sutar Ram Chandra Vithaliaji, The first of Chaitra Vadi of Sambat 1945. Tuesday the 16th, April 1889, in cash Rs. 2125/-, namely rupees twenty one hundred and twenty five, in full in cash have been recieved (*i. e.* borrowed) on personal security. The same is payable. The interest thereon accrues due at the rate of 6½ p. c. The same are payable whenever the Dani may demand.”


Sd. Ram Chandra Vithaliaji.

1. *Mangal Sen Jedev Prasad vs. Ganeshi Lal* 1936 A. L. J. 246.

2. *Macpherson* on contracts 168.

3. 11 I. C. 686.

4. *Jetha Parkha vs. Ram Chandra* 16 Bom. 690.


Advocate
Jammu & Kashmir
Srinagar.

Firman Jog
Hundi.

Jokhmi Hundi.

It is payable to the order.

It implies a condition that the money shall be payable only on arrival of goods against which the Hundi is drawn. It is in the nature of an insurance policy with this difference that the money is paid before hand and is to be reimbursed if the ship arrives safely.¹ The sender of the goods draws the hundi against the consignee. The hundi is negotiated with the insurer who pays the amount less the premium of the insurance. On the safe arrival of the goods the holder recovers the price of the hundi in full from the drawee. The drawee, according to the custom, is not bound to accept the hundi even if he should take possession of the goods sent to him. Thus the hundi was solely on the credit of the drawer and that the drawee was not liable to pay to the holder.

Example of a Jokhmi Hundi given in 4 Bom. 333.

"There is welfare. To the feet of the worshipful brother of five fold dignity, Liladhar Govindji, at the sea port town of Bombay, a great and good place. From Nau Nagar, written by Bhai Liladhar Govind Ji, whose prostrations do you be good enough to read. To wit: (We) have received here from (Thakur) Tadavji Gopal Ji Rs. 4000/- in words, forty hundred, in full, which are received. In respect thereof this Jokhmi (*i. e.* conditional) hundi (is drawn against goods) on board the "Gunga Hari Prasad" Nakhwa Bhaja, owner Th. Dayalji Morarji, (being) 29 (twenty nine) bags of sheeps' wool shipped from the sea port town of Luna, against which (this) Jokhmi (conditional) hundi (is drawn) after the said vessel shall have arrived in a safe, sound and secure manner. After the time of four (*i. e.* eight) days (thereafter) do you be good enough to pay (the money) to (one) named Shah, looking to (his) means, station and place. The token is that we shall write (about it) in the letter (of advice). The 14th, of Magsar Vadi of Sambat 1935 (22-12-1878). The handwriting of Damodar, the son of the living Inderji, whose prostrations do you be good enough to read.

ON THE BACK.

Do you be good enough to pay the double of the half Rs. 2000/- twenty hundred, in all Rs. 4000/- forty hundred; Do you be good enough to pay according to the usage of Jokhmi (conditional) hundi.

Rs. 4000/-.

5. Jadavji Gopal vs. Jetha Shamji 4 Bom. 333.

The transaction is as follows:—

Jawabi Hundi.

“A person desirous of making a remittance writes to the payee and delivers the letter to a banker who either endorses it on to any of his correspondents near the payee's place of residence or negotiates its transfer. On its arrival, the letter is forwarded to the payee who attends and gives his receipt in the form of an answer to the letter, which is forwarded by the same channel to the drawee of the order.”¹ Thus it is more in the nature of a letter of recommendation than a bill of exchange for the choice of payment solely lies with the banker.

A hundi may be accepted for honour under a Zikri chit. It is a letter of protection given to the holder by the drawer or any prior party to be used in case of dishonour of the hundi. It is addressed to some person in the town where the hundi is made payable. It asks the addressee to pay the hundi in case of its dishonour. The hundi might be accepted for honour under Zikri Chit without being protested. It is a prevalent custom among Marwari Sarrafs.

Zikri Chit.

The Zikri chit is not usually a separate letter. At the place where endorsement is made it is also written “Should the drawee not honour the hundi it should be presented for payment to so and so.” This is called the Zikri Chit.

It is current in Bengal. It is not a bill of exchange nor it is negotiable. It is merely a request by the borrower to the lender to pay the amount of money written in the Purja.

Purja.

A paid up and cancelled hundi is called *khokha*.

Khokha.

Peth, Perpeth and Majar Nama.

If a hundi is lost the holder might call upon the drawer to issue a duplicate called *Peth*. If *Peth* is lost the drawer issues a *Perpeth*. Should that also be lost a committee of merchants issue a *majarnama*.² Below are given examples of these:—

Greetings from Prem Chand of Benares to the respectable Shah Miri Mal Ji of Lucknow. Drawn a hundi for Rs. 1,000/- one thousand in letters whose half is five hundred against you. Amount received from Shri Ramji this day the 4th. April 1938. Please pay the amount im-

Hundi

1. Macpherson on contract page 166.

2. Hindi Bahi Khata by Kastur Mal Banthia p. 248.

mediately on sight according to the market practices for Shah Jog hundi. Dated 4th. April 1938.

Peth.

Greetings from Prem Chand of Benares to the respectable Shah Miri Malji of Lucknow. Drawn a hundi for Rs. 1,000/- whose half is Rs. 500/- on 4th. April 1938 against you. Value received from Shri Ramji who says that the hundi is lost. Should the hundi be lost please consult your account books and pay up this Peth. Should you have paid the hundi please treat the peth as cancelled and return it to me. Peth written on 3rd. May 1938.

ON THE BACK.

Peth.

Please pay Rs. 1,000/- the four times of Rs. 250/-
To,

Shah Miri Malji,
Kaisar Bagh, Lucknow.

Per Peth.

Greetings from Prem Chand of Benares to the respectable Shah Miri Mal Ji of Lucknow. Drawn a hundi for Rs. 1,000/- whose half is Rs. 500/- against you on 4th. April 1938. Payment received from Shri Ram Ji The Peth of the hundi was written on 3rd. May 1938. The payee says that both the hundi and the Peth are lost. If so, please consult your books and pay up this Perpeth. Should payment of the hundi or the Peth have been made please treat this Perpeth as cancelled and return it to me. Written today the 20th. May 1938.

ON THE BACK.

Perpeth.

Please pay up Rs. 1,000/- the four times of Rs. 250/-

To,

Shah Miri Malji,
Kaisar Bagh,
Lucknow.

Major Nama

Greetings from all the Punches of Saraffa of Benares to all the Punches of Lucknow. Prem Chand of

Benares drafted a hundi for Rs. 1,000/- against Shah Miri Malji of Lucknow. Payable at sight according to market custom. Value received from Shri Ramji on 4th. April 1938. Its Peth was executed on 3rd. May 1938 and perpeth on 20th. May 1938. Payee alleges the loss of hundi, peth and perpeth. If the hundi, peth and perpeth be lost please consult your books and pay up this majarnama. If the hundi, peth or perpeth should have been paid please treat the majarnama as cancelled and send it back to us.

Wrote this majarnama today the 30th May 1938

Signed	1	}	Punches of Saraffa Benares
	2		
	3		
	4		
	5		

Of the various kinds of Hundi enumerated above Jawabi Hundi, Nam Jog Hundi and Zikri Chit are still in vogue but unfortunately no case law is to be found on them. Only one case is to be found among the reported cases on Jokhmi Hundi. The most prevalent form of Hundi is the Shahjog Hundi and the others have gone almost out of use. Therefore we would discuss the nature and the law of mostly Jokhmi and Shah Jog Hundis.

Nature of Jokhmi Hundi.

In *Jadowji Gopal Vs. Jetha Shiamji*¹ the word "Jokhmi" was interpreted to mean conditional and the nature of the Jokhmi Hundi is described by Sarjent J. as follows:—

"The peculiar nature of the Jokhmi Hundi is, that it is always drawn on or against goods shipped on the vessel mentioned in the Hundi, and, the price paid for a Jokhmi Hundi depends, on the rate of exchange, the vessel in which the goods are shipped, the season, and the nature of the goods. A Jokhmi Hundi would thus appear to have been designed with a double purpose, viz., to put the drawer of the hundi in funds, and at the same time, to effect an insurance upon the goods themselves, by reversing the position of the insurer and insured, from that which obtains in ordinary policies, the insurer being the buyer of the hundi, who pays the insurance money down, and is entitled to recover it with a premium (together making the amount of the hundi) in case the vessel arrives safely."

In the same case the drawer of the hundi has been called hundiwala and the consignee malwala. The relationship between hundiwala and malwala has been described as follows:—

Rights and liabilities of the parties of the Jokhmi Hundi.

1. (1879) 4 Bom. 333.

"As to the rights of these parties, that is, of the hundiwala and malwala, they are almost in identical positions of the underwriter and the assured in an ordinary english policy of an insurance, with, of course, this great difference, that when we come to enforce these rights, the position of the parties is reversed; it is the underwriter (or his representative) who has to recover whatever may be due to him; the assured has already been paid in full.

In the simple case of total loss, there is no further trouble; the hundiwala or the holder of the hundi has no remedy. The malwala, of course, will not accept or pay; and, though the holder of the hundi for value, the hundiwala has no recourse to the drawer, because the Hundi is Jokhmi, that is subject to the risk of the vessel being lost.

In the event of the safe arrival of the ship and cargo, again, the rights of the hundiwala are plain. He should present the hundi to the malwala on the arrival of the ship and before delivery has been taken of the goods. If the malwala wishes to take delivery, he should accept and pay the hundi. If he determines not take the delivery of goods, he may do so; in that case, he should hand over possession of them to the hundiwala, who has then no further claim upon him.

In the intermediate case of partial loss of goods, or damage, the rights of the parties seem to be very much those enjoyed under the English Marine Insurance Law. The hundiwala is entitled to be paid in full in the case of partial loss or damage, unless it amounts to a general average loss. In that event, a general average statement should be made and the hundiwala should accept payment of these hundis with such a rebate as their several proportions of the average loss may amount to."

His Lordship further observed.

"But if that person, after examining and taking charge of goods will be so strong as not to pay money for the hundi, or, if that person becomes insolvent and the hundi returns, the writer of the hundi or the seller, whichever may be substantial shall pay the money thereof, the interest and the charges for non-acceptance of the hundi, without raising any objection."

The holder of the hundi must apply to the consignee for money. If the consignee refuses to accept the hundi the holder may take possession of goods. If he does not get the goods he may approach the drawer. The drawer is not liable if the consignee refused to accept the hundi or deliver the goods. The holder of the hundi must sue the consignee. The holder is entitled to the goods if the drawee should be insolvent.

1. The Jokhmi hundi is drawn always against goods shipped abroad and the hundi serves the purpose of a policy of insurance. The consignee of the goods is the under writer and the drawer is the person insured. The Shah Jog Hundi has nothing to do with the shipment of goods.

Distinction
between a Shah
Jog and a Jokhmi
hundi.

2. In case of a Shah Jog hundi the drawee pays the money on the credit of the Shah. The Shah guarantees the genuineness of the hundi and is always liable to the drawee if any defect in the hundi be found. He, of course, does not guarantee the solvency of the drawer. In a Jokhmi hundi the drawer is always responsible except if the goods against which the hundi is drawn are totally lost or the consignee takes possession of the goods and does not pay the hundi in which case the holder can sue the consignee.

Jokhmi Hundi forms a class by itself. It was of importance when goods used to be sent both in and outside the country on big boats and ships. Such goods were liable to be lost either due to piracy and dacoity or due to the boat or ship being drowned. With the introduction of the Railways the communication by river practically came to an end and the foreign shipping too has become safer. This is one of the reasons why Jokhmi hundi is no more used. Another very important factor which is responsible for this sort of hundi being discarded is the establishment of insurance companies. The private insurance brought about through the Jokhmi hundi has come to an end. Thus the Jokhmi hundi has now become only of academic importance.

The other kind of Hundi is used for raising loans or settlement of private monetary obligations from one place to another. These hundis are still in vogue. Among the various classes of the hundis enumerated above the most prevalent form is the Shah Jog Hundi. Therefore it is better to discuss the nature of the hundis in general and then to see what peculiar characteristics a Shah Jog Hundi carries with itself. A hundi is purely a creation of usages and the merchants in various commercial centres have their own peculiar usages. Although these usages differ in details but there are broad features which are common everywhere. The fundamental nature of the hundi is the same throughout the country and is well understood by the merchants dealing with it. A hundi may be drawn on any person at any place but they are generally drawn on big important centres of commerce such as Madras, Bombay, Calcutta, Lahore, Delhi and Cawnpur.

Nature of a Hundi.

There is no authorized or accepted definition of a hundi. Its nature can only be understood by comparing

it with the principle kinds of negotiable instruments. The Indian Negotiable Instruments Act recognizes three kinds of negotiable instruments *i. e.* Promissory note, Bill of exchange and Cheque.

Promissory note
and hundi.

Promissory note is defined in section 4:—

“A Promissory note is an instrument in writing (not being a bank note or currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to or to the order of, a certain person or to the bearer of the instrument.”

A hundi resembles a promissory note but it differs in the following very important aspects:—

(1) In a hundi we have three parties (a) drawer or the person who makes the order (b) drawee, or person to whom the hundi is addressed and if he accepts, the acceptor (c) the payee, the person in whose favour the hundi is drawn. In a promissory note there are only two parties *i. e.* the promiser and the promisee.

(2) A promissory note cannot be drawn by a promiser in his own favour. Such an instrument would be invalid as the same person cannot be both the promiser and the promisee. In the case of hundi there need not be three different persons as drawer, drawee and payee. One and the same person may become the drawer and payee, drawee and payee or the drawer and the drawee. An instrument still remains a bill of exchange where the drawer and the drawee are the same person.

(3) The original shape and wordings of these two instruments are not the same. The endorsement, however is exactly similar. It is an order by the endorser of the note upon the maker to pay the endorsee. The endorser is, as it were, the drawer, the maker, and the acceptor and the endorsee, the payee.

(4) In a hundi it is an unconditional order to pay while in a note it is an unconditional promise. The hundi or the bill of exchange implies that drawer has a right to call upon the drawee to pay; while the promissory note implies the promise of the maker. In the case of hundi the credit of the drawer and the drawee are to be seen while the promissory note passes current on the credit of the maker alone.

Bill of exchange
and hundi.

A bill of exchange is defined in Sec. 5:—

“It is an instrument in writing, containing an unconditional order, signed by the maker, directing a certain person to pay a

certain sum of money only to, or to the order of, a certain person or the bearer of the instrument."

The elements of a bill of exchange are:—

- (1) It must be in writing.
- (2) It contains an unconditional direction or order.
- (3) It must be signed by the maker.
- (4) It must direct a certain person to pay a certain sum of money.

(5) The money should be paid only to or to the order of a certain person or to the bearer of the instrument.

In a hundi the elements 2 and 5 need not be necessarily present. For instance in a Shah Jog¹ hundi two elements are wanting.

(1) It does not direct that the money should be paid to the bearer of the instrument.

(2) It does not direct payment to be made to a named person. The direction is to pay to a Shah or a monied man. Similarly in a Jokhmi hundi the payment is made subject to certain conditions.

Although a hundi is a bill of exchange in an Indian language it is subject to two important limitations:—

(i) THE LOCAL USAGES.

Where local usages are proved to exist they shall prevail even against the provisions of the Negotiable Instruments Act.² If no such local usage is proved the Act shall apply as much to a hundi as to a bill of exchange.³

(ii) SECTION 25 OF INDIAN PAPER CURRENCY ACT. 1882

It runs as follows:—

"No person in British India shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand or borrow, owe or take up any sums of money on the bills, hundis or notes payable to bearer on demand of any such person:

Provided that cheques or drafts payable to bearer on demand or otherwise may be drawn on bankers, shroffs or agents by their customers or constituents in respect of deposits of money in the hands of those bankers, shroffs or agents and held by them at the credit and disposal of the persons drawing such cheques or drafts."

1, Mangal Sen Jaidev Prasad vs. Ganeshi Lal 1936 A. L. J. 246, 247.

2. Khan Chand vs. Golab Ram 10 I. C. 133; 39 P. R. 1911; 26 Mad. 526; 20 Bom. 488.

3. Johar Mal vs. Nain Sukh 5 I. C. 745. (Nagpur)

Section 26 makes the issuing of such bills and notes a criminal offence and prescribes the penalty.

Instruments drawn in contravention to sec. 25 of Paper Currency Act are not only punishable criminally under sec. 26 of the Act but the contracts are void under section 23 of the Indian Contract Act.¹ A paper drawn against this section is admissible in evidence to prove the debt.² The suit must be based on the original consideration.³ The prohibition does not extend to endorsement in blank by which it becomes payable to bearer; for a person by endorsing in blank does not make a note payable to bearer on demand.⁴ The proviso to sec. 25 exempts from its operation cheques or drafts payable to bearer on demand or otherwise on banker, sarrafs, etc., in respect of deposits held by them at the disposal of the customer.⁵ A hundi may be drawn against an intended deposit, but a person does not become a banker merely because he endorses to another a hundi drawn on him.⁶ A hundi drawn in favour of a specified person but made payable to bearer is void under the Paper Currency Act.⁷ The question naturally arises what is the position of a Shah Jog Hundi which is so widely prevalent in the market? Is it in contravention to the Paper Currency Act or is within the protection of the section? In other words is a Shah Jog Hundi an instrument payable to bearer?

Is a Shah Jog Hundi payable to bearer?

In an early Calcutta case⁸ Peacock, C. J., held that such a bill would, at any rate prior to acceptance, pass by delivery, and that the acceptor or drawee would not look to the genuineness of a note brought to him by a man of known respectability. This comment has been criticised in several cases. In *Thakur Dass Vs. Fateh Mal*⁹ Phear, J., doubted where the Hundi in the case of *Goursi Mal Vs. Dhan Sukh Dass* was a Shah Jog Hundi and remarked,

1. *H. V. Law & Co. vs. Sadhna Kumar* 1931 Cal. 791; 1928 All. 371; 40 Mad. 585.

2. *Nazir Khan vs. Ram Mohan Lal* 1931 All. 183 F. B.; 45 Mad. 778; 1917 M. W. N. 778.

3. *Chedambaram Chettiar vs. Ayyasami* 40 Mad. 585; A. I. R. 1917 Mad. 201.

4. *Sana Eman Sahib vs. Mooma Ena Mohammad* 22 I. C. 77; *Shaikh Ismail vs. Ezellial* 56 I. C. 930.

5. *Aruna Chelani vs. Narayan* 42 Mad. 470.

6. *Alagappa vs. Alagappa* 44 Mad. 187.

7. *Aruna Chalam vs. Narayan* 42 Mad. 470; 44 Mad. 187; *Main Bux vs. Bodhia* 50 All. 839.

8. *Goursi Mal vs. Dhansukh Das* (1865) 7 Beng. L. R. 289.

9. (1871) 7 Beng. L. R. 275.

"It seems to be only common sense that the term "Shah Jog" should be subordinate to the directions of the successive owners, and should mean 'the right man to be paid' according to the tenor of the document, which must include both the endorsement and acceptance. I certainly am not aware of any rule of Hindu law, customary or otherwise, which would have the effect of making the word 'shah jog' mean payable to bearer, quite independently of the endorsements. If there were such a rule in practice, endorsements would be useless, and would, I suppose, very soon be dropped altogether. Also I know of no principle of mercantile expediency having the force of law or otherwise, which would be served by our disregarding the direction of the endorser, and treating a specially endorsed and specially accepted hundi, as if it were an English negotiable instrument made payable to bearer and as such, part of the currency of the country. On the contrary, as it appears to me expediency is all the other way."

In *Ganesh Dass Vs. Lachmi Narain*¹ Bayley, A. C. J., also doubted if the hundi in dispute in *Thakur Dass Vs. Fateh Mal* was a Shah Jog hundi. It was also held that a hundi continued to be a Shah Jog hundi even after being endorsed to a particular person and did not lose its character as such, and that the defendants were bound to make enquiries as to the person who presented the hundi to them for payment so as to ascertain his respectability and position. The dictum of Peacock, C. J., was disapproved and the Shah Jog Hundi was not held to be a bearer instrument.

The same question came up for decision in the Calcutta High Court in *Bhupat Ram Vs. Hariprio*.² Stanley, J., held,

"If a Shah Jog hundi were a hundi payable to bearer, quite independently of the endorsements on it there would be much to be said in favour of the defendant's contention that payment to Rampal was a good payment, but it appears to me impossible to hold that the hundi payable to the Shah Jog is equivalent to a hundi payable to a bearer. According to the tenor of the instrument such a hundi is only payable to the respectable holder."

In an Allahabad case³ Stanley, C. J., and Banerji, J., held that a Shah Jog hundi is not a hundi payable to bearer but only to a holder of respectable position and repute. In a latter Calcutta case⁴ Fletcher, J., following the decision of the Allahabad High Court and the Bombay High Court held that Shah Jog hundi was not payable to

1. (1894) 18 Bom. 590.

2. (1900) 5 C. W. N. 313.

3. *Lalla Mal vs. Kesho Dass* (1904) 26 All. 494.

4. *Jalan Chand vs. Assa Ram* (1915) 22 C. L. J. 22 : 33 I. C. 247.

order or bearer. This decision was approved of in another case¹ of the same High Court in which five Shah Jog hundis, each bearing a stamp of four annas and attested by a witness, were in question. The question was whether they were insufficiently stamped. Mukerji and Roe, JJ., held that the instruments in question were not hundis payable to bearer but were bonds within the meaning of the Stamp Act and were admissible in evidence under section 35 (A) on fulfilment of the conditions contained in the section. Mukerji, J., observed,

“There is no unconditional undertaking to pay in this case, nor is the instrument payable to the bearer, because a Shah Jog Hundi which is the name given to the instrument before us, is only payable to the respectable holders and is not equivalent to a hundi payable to the bearer.”

In a recent Bombay case² Mirza, J., took a view quite different from a string of rulings cited above and agreed with the dictum of Peacock J. He was of opinion that the hundi before Peacock, J., was a Shah Jog hundi. After discussing a number of cases His Lordship remarked,

“As a result of these authorities the conclusion I have come to with regard to shah jog hundi is that a shah jog hundi in its inception is a hundi which passes from hand to hand by delivery and requires no endorsement. The name of the depositor is mentioned in the body of the hundi, but there is no direction in the hundi that the amount is to be paid either to the depositor or to his endorsee. Indeed, the body of the hundi requires that the amount be paid to a shah. It contemplates the hundi passing from hand to hand until it reaches a shah, who after making due enquiries to secure himself would present it to the drawee for acceptance or for payment. The shah jog hundis which appear in the cases I have reviewed bear an endorsement to the effect that the depositor has sold the hundi to a person named therein, but it is significant that the endorsement does not bear the signature of the depositor nor does it give a direction to the drawee that the amount is to be paid to the order of anybody. It merely recites the fact that the depositor has sold the hundi. I am aware of no provision of the Hindu law whereby any sale is to be evidenced by writing. The ancient systems of law lay stress upon delivery of possession rather than a writing as evidence of sale. Absence of an endorsement on the hundi would not, in my opinion, affect its validity if it is a shah jog hundi. But although a shah jog hundi in its inception is one which passes by delivery without any endorsement, yet it may at any time be restricted by being specially endorsed. Where any such restriction appears on the face of the hundi, that restriction applies to it and it ceases to be a bearer hundi which can pass from hand to hand. Anybody taking it after such endorsement has to comply with the requisitions as they

1. Keshri Chand Surana vs. Assa Ram Mahato (1916) 22 C. L. J. 209.

2. Champak Lal's case (1926) 50 Bom. 765.

appear on the face of the hundi and has to examine the title of the holder in the light of such endorsements.

Further the negotiability of the shah jog hundi as a bearer hundi comes to an end when it reaches the hands of the shah who presents it for acceptance or for payment."

Thus there appears a great conflict of opinion between Peacock J. and Mirza J. on the one hand and the other decisions of the Calcutta, Bombay and Allahabad High Courts cited above on the other. It is respectfully submitted that the whole trend of judicial authority seems to be that the shah jog hundi is not a hundi payable to bearer either in its inception or otherwise. It is a hundi payable to a shah or a person of known respectability.

Cheque is defined in section 6 of the Negotiable Instruments Act:— Cheque and hundi.

"A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

Hundi is a kind of bill of exchange and so it is enough to point out the difference between a cheque and a bill of exchange.

A cheque is a bill of exchange with differences peculiar to it. These differences were pointed out by Parke C. B. in the well known case Ram Charan Mullick Vs. Luchhmee Chand.¹

"A banker's cheque is a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some entirely different. A cheque does not require acceptance, in the ordinary course it is never accepted. It is not intended for circulation; it is given for immediate payment; it is not entitled to days of grace and though, strictly speaking, it is an order upon a debtor by a creditor to pay to a third person whole or part of a debt yet, in the ordinary understanding it is not so considered. It is more like an appropriation of what is stated as ready money in the hands of the banker, and in giving the order to appropriate to a creditor the person giving the cheque must be considered as the person primarily liable to pay who orders his debt to be paid at a particular place, and as being much in the position of the maker of a promissory note, or acceptor of a bill of exchange payable at a particular place and not elsewhere, who has no right to insist an immediate payment at that place."

Analysing these differences they are as follows:—

(i) It is always drawn on a bank or banker.²
Government treasury is not a bank carrying on business

1. (1884) 9 Moore P. C. 46 page 69.

2. Meban vs. Clydesdale Banking Co. 9 A. C. 95, 107.

for profit.¹ A banker may draw a cheque on himself.²

It is supposed to be drawn on funds in the hands of a banker. A cheque is merely an order to pay which the banker may or may not obey. In case of wrongful refusal it is liable to be sued by the drawer and not the payee.³ If the bank makes the payment by mistake having no assets of the drawer in its hand, it cannot recover the amount from the payee.⁴ Payment of a cheque does not create a presumption that a loan has been advanced, rather that it has been paid out of the funds in the hands of the banker.⁵

(ii) It is always payable on demand without any days of grace.⁶

(iii) It requires no acceptance. By being marked or initialled a cheque is given an additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment and adding to the credit of the drawer and the bank on which it is drawn.⁷

(iv) A drawer of a cheque is not discharged by failure of the holder to present it in due time unless the drawer has sustained damage by the delay.⁸ A cheque once drawn but not presented is not evidence of money previously lent to the drawer by the payee.⁹

(v) A cheque is revocable. The authority to pay may be withdrawn by the drawer and may be determined by notice of the customer's death or bankruptcy.¹⁰

(vi) Where a cheque is not honoured, notice of dishonour is not necessary as in the case of bills. Want of assets in the hands of the banker is sufficient notice,

In a hundi which is a kind of bill of exchange these peculiarities are not to be found.

The nature of hundi in general differs in certain respects from the other kinds of negotiable instruments, as shown above but Shah Jog Hundi is a class by itself

1. Ranga Swami vs. Sankara lingam, 43 Mad. 816.

2. Roso vs. London country West Minister and Parr's Bank Ltd. (1919) 1 K. B. 678, 687.

3. L. R. 19 Eg. 76.

4. Sec. 72 Indian Contract Act.

5. Flecher vs. Manning 12 M. & W 571, Pott vs. Clegg 16 M & W 321.

6. Ram Sarup vs. Hardev 50 All. 309; Maclean vs. Clydesdale Banking Co. 9 A. C. 95, 107.

7. Gaden vs. Newfoundland Savings Bank (1899) A. C. 281.

8. Sec. 84 of the Negotiable Instruments Act.

9. Pearce vs. Davis (1834) 1 Moo & R 365.

10. 26 All. 493.

The peculiarities possessed by a Shah Jog Hundi are not to be found in the other kinds of hundi.

Peculiarities of a shah jog hundi.

1. The body of a shah jog hundi must always possess the word 'shah jog' indicating that the hundi is payable only to a shah. A shah is a responsible and respectable person, man of worth, substance and credit well known in the bazaar and not a man of shadow.¹

2. A shah jog hundi is neither promissory note nor a bill of exchange nor a cheque either payable to bearer or order within the meaning of the Negotiable Instruments Act or the Stamp Act. It is not a bill of exchange payable to bearer so as to pass by mere delivery. It is always payable to a particular kind of person called shah meaning a man of substance. If it is attested it becomes a bond within the meaning of Stamp Act.²

3. It is negotiable by the custom of the country. The question of its negotiability has been discussed from time to time.

Bill of exchange is defined in section 5 of the Negotiable Instruments Act as "an instrument in writing containing an unconditional order signed by the maker, directing a certain person to pay a sum of money only to or to an order of a certain person or to the bearer of the instrument." In *Kanhaiya Lal Vs. Balram Dass*³ it was held by Madras High Court that a shah jog hundi is a bill of exchange and therefore a negotiable instrument under the Negotiable Instruments Act. In an Allahabad case⁴ it was held that a shah jog hundi is a hundi payable to a certain person and not to order or bearer and thus is not a negotiable instrument. Before the Amending Act VIII of 1919 it was necessary in order to make the instrument negotiable to insert the words of negotiability such as "order" or "bearer"; an instrument drawn payable to a specified person was said to be not negotiable.⁵ Under the

1. *Davlatram Shri Ram vs. Bulaki Dass Khemchand* (1869) 6 Bom. H. C. R. 24; *Champak Lal vs. Kesrichand* (1926) 50 Bom. 765; *Murli Dhar vs. Hukam Chand* A. I. R. 1932 Lah. 312.

2. *Thakor Lal vs. Fateh Chand* (1871) 7 Beng. L. R. 275; *Devlatram Shri Ram vs. Bulaki Das Khem Chand* (1869) 6 Bom. H. C. R. 24; *Ganesh Dass vs. Lachminarayan* (1894) 18 Bom. 570; *Bhupatram vs. Hari Prio* (1901) 5 C. W. N. 313; *Lalla Mal vs. Kesho Dass* (1904) 26 All. 493; *Jalanchand vs. Assaram* (1916) 22 Cal. L. J. 22. *Keshri Chand vs. Asaram* (1916) 22 Cal. L. J. 209.

3. 43 Mad. L. J. 480.

4. *Lalla Mal vs. Keshav Mal* 1 A. L. J. 254.

5. *Jetha Parkha vs. Ram Chandra* I. L. R. 16 Bom. 690.

definition of a negotiable instrument after the Amending Act VIII of 1919 a bill payable to a particular person containing no words prohibiting transfer or indicating an intention that it shall not be transferable, is a bill payable to order. The question again came up before the Allahabad High Court¹ in 1936. The hundi in that case was also a shah jog hundi. Rachhpal Singh, J., in a very learned judgment held that it was an instrument payable to a shah and the payer was to decide as to who is a shah. It was held that the instrument was not covered by the Negotiable Instruments Act but was negotiable by the usages of the country.²

4. Shah jog hundi while retaining the character of a bill of exchange differs from it in two very important respects:—³

(a) In case of a bill of exchange it is necessary to write acceptance across it but no acceptance is written across a shah jog hundi. The circumstance gives the shah jog hundi an additional degree of credit and at the same time imposes an additional degree of responsibility on the acceptor.

(b) Unlike a bill of exchange it is not necessary to present a shah jog hundi for acceptance to the drawee or acceptor before it is presented for payment, *i. e.* before they are due or overdue.

5. A shah jog hundi resembles a cross cheque in one very important respect. The cross cheque is payable to a banker and the shah jog hundi is payable to the shah. When banks did not exist this shah or sarraf discharged the duties of a banker, and the notion continues upto this day. These practices have been adopted only to avoid fraud and forgery. The cross cheque however is a superior instrument to a shah jog hundi. In case of former the banker always remains liable to the drawer of the cross cheque if he wrongly pays it under a forged endorsement or signature while in the latter case the shah guarantees the genuineness of the hundi but if the hundi turns out to be forged one his liability is discharged if he can produce the actual forger otherwise he remains liable to the drawee or the drawer as the case may be.

1. Mangal Sen Jai Deo Prasad vs. Ganeshi Lal 1936 A. L. J. 246.

2. Daulat Ram vs. Bulaqi Das 6 Bom. H. C. R. 24, Malmukand vs. Collector of Jaunpur 1884 A. W. N. 3 Ganeshi Das vs. Lachhmi Narain 18 Bom. 570 Madho Ram vs. Nandu Mal 58 I. C. 982. Champak Lal vs. Kesri Chand 50 Bom. 765.

3. Daulat Ram vs. Bulaqi Das 6 Bom. H. C. R. 24.

6. A shah jog hundi retains its character as such if it is payable to one of the several payees alternatively one after the other. Such an instrument comes within the definition of sec. 13 (2) of the Negotiable Instruments Act of 1881 as amended in 1914.¹

7. The general presumptions raised under sec. 118 of the Negotiable Instruments Act that the bill of exchange is drawn endorsed, transferred or negotiated for consideration applies to a shah jog hundi. The burden of proof lies on the person who challenges the consideration.²

8. Shah's name must always be endorsed on it before it is presented for payment.³

9. An endorsement "for realization" of a shah jog hundi is in the nature of a restrictive endorsement which gives the endorsee right to receive payment and sue the acceptor if not paid; but he can not transfer his rights as an endorsee to anybody.⁴

10 Court must put reasonable construction on the wordings of an endorsement or an acceptance on the hundi. If the owner of the hundi endorses on it as sold or sent to A it only means that the right of dealings with the hundi is passed to A alone.⁵

11. A shah jog hundi is inferior to any kind of negotiable instrument in one respect. Under the English law no title passes to anybody on a forged bill or a forged endorsement on it; while in the case of a shah jog hundi if it is forged the shah can escape his liability by producing the forger. This aspect of the hundi greatly affects the negotiable value of the hundi. In another respect it is equally superior to any other kind of negotiable instrument except probably a crossed cheque. In the case of other kinds of bills the endorsee or the payee may be a man of no substance whatsoever and from whom nothing can be realised; in the case of shah jog hundi the payee or the endorsee is always a shah or a man of substance or respectability who can always be caught hold of in case the instrument is found defective for which the shah may be liable.

1. Kanhaiya Lal Bhoga vs. Balaram Paramsukh Das 43 Mad. L. J. 480.

2. Madhuram vs. Nandu Mal (1902) 1 Lah. 429.

3. Daulat Ram vs. Bulaqi Das 6 Bom. H. C. R. 24, Champak Lal vs. Keshri Chand 50 Bom. 765; A. I. R. 1926 Bom. 471.

4. Thakur Dass vs. Fattah Mal 7 B. L. R. 275; Bhupat Ram vs. Hari Prio 5 C. W. N. 313; Ganesh Das vs. Lachmi Narain 18 Bom. 571.

5. Thakur Dass vs. Fatehmull (1871) 7 Beng. L. R. 275 S. C. 16 W. R. 3 (O. C.)

12. It is incumbent upon the party dealing with a shah jog hundi to make enquiry into the position of a shah. If the drawee fails in his duty to make proper enquiries he is liable to the drawer even though he may be innocent,¹ but the negligence must be approximate and immediate cause of loss.²

Parties to a hundi.

Drawer.

1. Drawer is a person who gives the order to pay and makes the hundi. He must sign the instrument either personally or through an agent.

The signature of a drawer is necessary and there cannot be a bill even if the instrument is accepted without the signature of the drawer. In a bill there can be joint drawers but never alternative ones.

Drawee

2. Drawee is a person who is directed to pay. He must be named with reasonable certainty. A drawee need not accept a bill but having ones accepted he must pay it on due date or when presented if there be no period in the bill

Drawee in case of need.

Where in a bill of exchange the name of a person is given in addition to the drawee to be resorted to in case of need, such a person is called drawee in case of need. If the drawee refuses to pay the bill it must be presented to the drawee in case of need before it can be taken to be dishonoured.

Acceptor.

The drawee of a bill who has signed his assent upon the bill is called acceptor.

In this connection it is necessary to discuss the nature of a valid acceptance.

Essentials of a valid acceptance.

(i) Acceptance on a bill of exchange must be in writing. Suitable words may be used to signify the assent, but even mere signature is sufficient. In case of hundi, however, even oral acceptance has been recognised if proved by local custom. Such a custom was set up in Delhi and the court accepted it.³

(ii) It must be signed. Mere signature or the word "accepted" usually written across the face of the bill with the signature underneath would be enough.

1. Ganesh Dass vs. Lachmi Narayan (1894) 18 Bom. 570; Lalla Mal vs. Kesho Dass (1904) 26 All. 493.

2. Bhupat Ram vs. Hari Prio (1901) 5 C. W. N. 313.

3. Panna Lal vs. Har Govind 51 I. C. 250. See also Dwarka Dass vs. Girdhari Lal 4 All. 355. Pannalal vs. Har Gopal 1 Lah. 80; A. I. R. 1924 All. 129; A. I. R. 1930 Lah. 471.

(iii) Acceptance must be on the bill.¹ It must be on its face or back. Acceptance on a copy of the bill which is not a part of it is not sufficient.² Noting of a hundi in the drawer's bahi is not a valid acceptance.³

(iv) Acceptance must be completed by the delivery of the bill. Where the drawee retains the accepted bill and then changes his mind and cuts out the acceptance before delivery, he is not bound by the acceptance.⁴

When a bill of exchange has been noted or protested for non-acceptance or for better security, any person not being a party already liable thereon may, with the consent of the holder, by writing on the bill, accept the same for the honour of any party thereto.

Acceptor for honour.

An acceptance for honour is a peculiar kind of acceptance which is allowed after the original drawee of a bill has refused to accept. Such an acceptance may be voluntarily made to prevent the parties to a bill being discredited or to prevent legal proceedings being taken against them. Acceptance for honour must be after regular noting or protest. According to the usage of Marwari merchants the holder of the hundi is provided with a "*zikri chit*" wherein the drawee in case of need is named. If the original drawee fails to pay the hundi and the "*zikri chit*" is presented to the person named for acceptance for honour. The acceptance for honour is made by writing on the chit.

1. It must be made after the drawee has refused to pay and after noting or protest. It cannot be made before the occurrence of these conditions.

Essentials of a valid acceptance for honour.

2. It must be done with the consent of the holder of the hundi.

3. Only a person who is not already liable to pay the hundi can accept it for honour. Thus a stranger or even a drawee who by his refusal to accept has become a stranger can accept the hundi for honour.

4. It must be signified by writing on the hundi and the hundi should be accepted as a whole.

5. Such an acceptance must be made before the hundi is over due.

6. It must be made to protect the credit of a person liable under the hundi.

1. Ardeshir Sorab Shah vs. Khushal Dass 32 B. 247 Young vs. Glover (1857) 33 Jur (N. S.) 637.

2. Gurudas vs. Ram Chandra 13 Lahore 31.

3. 13 Lahore 31.

4. 5 B & Ald. 474 (1821) Russel vs. Phillips (1850) Q. B. 891.

Payee

Payee is a person named in the hundi to whom or to whose order the money is directed to be paid. The name of the payee must be mentioned by the drawer in the bill. Where the payee is a fictitious person the bill may be treated as payable to the bearer. Besides the parties explained above there are two more terms which need explanation, namely, "holder" and "holder in due course." These two terms are defined in secs. 8 and 9 of the Negotiable Instruments Act.

Sec. 8.

"The 'holder' of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction."

Sec. 9.

"Holder in due course means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer,

or the payee or indorsee thereof, if payable to order, before the amount mentioned in it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title."

The definitions of 'holder' in these two sections are different. In section 8 holder means a person entitled in his own name to possession of the instrument and to recover its amount; while in section 9 it is used in a wider sense¹ applying to all *de facto* holders than *de jure* holders only. According to section 8 the term 'holder' will not include any person who though in possession of the instrument is not entitled to sue upon it, such as, the finder of a lost instrument payable to bearer, a thief in possession of the instrument or even the payee who is prohibited by an injunction of court from receiving on it.²

In mercantile practice the exclusion of the *de facto* possessor does not work such a hardship as would at first sight appear; for according to sec. 82 of the Negotiable Instruments Act the instrument is discharged only by payment in due course. In case of hundi the difficulty is even less. In an open market the hundi, not being an instrument payable to an un-named bearer, is always paid either to payee or the endorsee who usually becomes a

1. 2 C. W. N. 286.

2. Subramania vs. Chokha Singh 44 M. L. J. 206.

holder in due course. In order to fully grasp the idea of a holder it is necessary to see who are the persons entitled to sue.

The Negotiable Instruments Act does not apply to devolution of rights by operation of law. So a note in the name of a trustee can be sued upon by a succeeding trustee.¹ But one of the several heirs of a deceased promisee cannot maintain a suit on the instrument in his own name.² Where a promissory note stood in the name of one of the members of a joint Hindu family who died leaving a widow and it was found that the note was not taken for the benefit of the family but was taken for the benefit of the deceased and the first plaintiff, one of the other members of the family, it was held that neither he nor all the surviving members could maintain a suit upon it.³ Where a bill is endorsed for collection and the endorsee returns the bill to the endorser, the former ceases to be a holder even though the bill is not re-endorsed.⁴ The difficulty very often arises when the holder of the instrument is a mere benamidar but the real owner brings the suit. In such a case there is a great difference of opinion as to whether the suit is maintainable.

Persons entitled to sue.

The Madras High Court and the Judicial Commissioners Court at Nagpur are of the view that the holder of a note even if benamidar can sue upon it.⁵

The Bombay High Court is of the same view.⁶ The Calcutta High Court has gone so far as to hold that the real owner cannot sue even if the benami holder is a party to the suit.⁷ In another case, however, it was held that a firm can sue on a pronote standing in the name of a partner.⁸ The Patna High Court took a different view. It was held that the beneficiary though not a holder of the pronote can sue upon it.⁹

-
1. Rama Nadhan vs. Katha Velan 41 Mad. 353.
 2. Antoni Sami vs. Guana Prakasam 12 L. W. 582.
 3. Gopal Aiyangar vs. Venkata Krishna Aiyangar 26 Mad. L. J. 224.
 4. Subramania Chetty vs. Alagappa Chetty 30 Mad. 441, 443, Ponnaya vs. Pala Niappa 7 M. L. J. 271, Jameson and Co. vs. Scott 36 Cal. 291.
 5. Rama Nuja Ayyangar vs. Sada Gapa Ayyangar 28 Mad. 205, also 21 Mad. 391, Subba Narain vs. Ram Swami 30 Mad. 89, Vishnu vs. Achut 105 I. C. 780 (Nagpur) Gulabgir vs. Nathu Mal A. I. R. 1932 Nag. 23.
 6. Shanta Ram vs. Shanta Ram A. I. R. 1938 Bom. 451. Kamla Kant vs. Madhavaji 1935 A. I. R. Bom. 343 : 59 Bom. 573 Krishnaji vs. Hanmaraddi A. I. R. 1934 Bom. 385 : 58 Bom. 536 Banido vs. Jamlen 12 Bom. L. R. 801. Virappa vs. Mahadevappa A. I. R. 1934 Bom. 356.
 7. Har Kishore Barva vs. Gura Mia Chowdhri A. I. R. 1931 Cal. 387.
 8. Brojolal vs. Budh Nath A. I. R. 1928 Cal. 148.
 9. Suraj Man Pd. vs. Sadanand A. I. R. 1932 Pat. 346 Sarjug Singh vs. Deo Saran A. I. R. 1930 Pat. 313.

The Allahabad High Court in one case endorsed the view of the Madras High Court¹ but it modified its view in a later case.² It was held that where a promissory note is executed in favour of one person in lieu of consideration advanced by another, the promisor cannot pay to the latter and get rid of the liability. But in a suit brought by the real holder to which the debtor and the holder of the promissory note are parties, a decree can be passed against the debtor for what is due from him with a clear proviso that payment shall be made by the debtor to the holder or to his credit and that it be made by deposit in court if money is recovered in execution and shall be to the credit of the holder.

Holder in due
course.

(i) He must be a holder—A holder in due course is a privileged kind of holder. He is protected from all defects in the instruments and his assignees and successors-in-title are also protected.

(ii) He must become a holder before the amount mentioned in the instrument should become payable. Only that holder can become a 'holder in due course' who takes it before the instrument becomes overdue.³ In the case of instruments payable on demand there is no fixed date on which it becomes payable. It becomes due when the demand is made; hence any endorsement before any demand is made turns the endorsee into 'a holder in due course'.⁴

(iii) He must be a holder for consideration. The consideration must be according to sec. 2 of the Contract Act. A donee of a negotiable instrument cannot be called 'a holder in due course'.⁵ A bank by crediting the amount of a hundi to customer's account becomes a holder in due course.⁶ Consideration may be different from that recited in the instrument.⁷ Marriage has been held to be a valuable consideration.⁸ The payment of consideration has been held to be a good proof of the bonafides of the holder.

1. Reoti Lal vs. Manna Kuar A. I. R. 1922 All. 70, following Ramanuj vs. Sadagopa 28 Mad. 205 and Dori Lal vs. Sewak Ram 13 A. L. J. 695.

2. Sewa Ram vs. Hoti Lal 1930 A. L. J. 1509 : 53 All 5 : A. I. R. 1931 All. 108.

3. 50 All. 309.

4. A. I. R. 1923 Lahore 638; 33 Mad. 24.

5. (1899) 42 Ch. D. 119.

6. A. I. R. 1926 Lahore 577; 49 Bom. 270; 36 Mad. 297.

7. 7 Rang. 292.

8. 1918 M. W. N. 173.

In *Raphail Vs. Bank of England*¹ a money changer took a bank note twelve months after he had received notice of a robbery, for full value, giving actual cash for it, it was held that the circumstances of his forgetting or omitting to look for the notice was no evidence of malafides.

(iv) He should become the holder without having sufficient cause to believe that the title of the person from whom he received was defective. The holder should take reasonable precaution to satisfy himself that no defect in the title exists. He need not make full enquiry.² Mere negligence will not constitute bad faith or lead to the presumption that he had knowledge or notice of the defective title of the person passing it to him. If there is anything which excites suspicion of something being wrong in the transaction, the omission to make enquiry may amount to bad faith.³ If a person takes a bill with some defect on the face of it *e. g.* blank acceptance, bill without signature of drawer, or the bill torn to pieces and then pasted on a paper or effaced or altered; without enquiry he takes it at his own risk.⁴ Knowledge of the defect must be at the time of taking the instrument.⁵ Subsequent knowledge will have no effect.

The position of a shah in case of a 'shah jog' hundi is quite analogous to that of a holder in due course in the case of an ordinary bill of exchange. Just as a holder in due course stands as a party intermediate between the drawer and the drawee, similarly the shah is also a middle party. The only peculiarity in case of a shah is that he, besides being a holder in due course, is always a man of honour, substance and credit in the market. There are certain privileges enjoyed by a shah which are not available to an ordinary holder in due course. These peculiarities would be discussed in the next heading when considering the rights and liabilities of the various parties to a hundi. In the case of a negotiable instrument it is very important to understand the positions occupied by a holder and holder in due course. Similarly in case of a shah jog hundi it is equally important to know the position occupied by a shah in respect to the various parties to a hundi.

1. 17 C. B. 171.

2. 8 B. L. R. 921.

3. 51 I. C. 537.

4. 2 Q. B. 168; 2 K. B. 15; 51 I. C. 53.

5. *Whister vs. Foster* 32 L. J. C. P. 161.

Rights and liabilities of a drawer.

Rights of a drawer.

A drawer has a right to get money on a hundi drawn by himself. In the case of an ordinary loan the loan has to be negotiated for, but in the case of a hundi the practice is so fixed that if the drawer is a man of established repute the hundi drawn by him can very easily be current in the market. The interest charged on a hundi is almost fixed by convention in every market. Thus it is much easier to raise money on hundi than by other means.

The drawer is always liable to pay to the holder in case of dishonour but if a hundi is lost the drawer has a right to safeguard himself against double payment. The drawer can call upon the owner of the hundi to give security to indemnify him against all persons whatever in case the bill is found again.¹

Liabilities of a drawer.

I. Liability to compensation in case of dishonour.

The drawer of a bill of exchange in case of dishonour by the drawee or acceptor is liable to compensate the holder.

This liability is subject to the following conditions.

(a) The bill should have been presented to the drawee and the drawee should have refused payment. The drawer is not liable as long as the bill is not presented to the drawee. If on presentation, the drawee accepts the bill, he becomes liable as principal debtor and the position of the drawer becomes only that of a surety. Before acceptance, however, or in case of non-acceptance the drawer always remains liable as the principal debtor.

(b) The notice of dishonour should have been given to the drawer within a reasonable time.² The notice should be given as soon as possible and an omission to give notice discharges the drawer³ on the bill as well as on the original debt.⁴ The notice is necessary even in the case of hundis unless there is local usage to the contrary.⁵ The notice may be waived by an express stipulation in the bill.⁶

(c) The drawer can escape his liability or limit it by a special contract.⁷ He can at the time of drawing the bill write the words "*sans recourse*" or any other

1. 15 W. R. 501.

2. 20 Bom. 133; 19 Cal. 156.

3. A. I. R. 1929 Lah. 577, 11 Lah. 34.

4. 35 Mad. 580.

5. 6 All. 78, 20 Bom. 133.

6. 26 Mad. 239.

7. 1 K. B. 531.

word to show that his liability would be limited in case the hundi is dishonoured.¹ Similarly in Punjab a drawer of a hundi by crossing the bill with the words "*srinishani*" is deemed to relieve himself from any personal liability in the case of the bill being subsequently dishonoured.² In Sindh a person who signs a hundi and writes the words *Daskhat* before his name incurs no personal liability.³

His liability as drawer is limited only upto the time of acceptance by the drawee. After the acceptance he becomes only liable as a sort of surety for him.

As a general rule, the particulars of a hundi must be entered in the books of the drawer.

Presentment at maturity is absolutely essential to charge the parties other than the maker or acceptor.⁴ After acceptance, however, the drawer is liable as principal debtor only when the hundi is dishonoured by the drawee. Where the drawer and the drawee of a hundi are the same no presentment is necessary to charge the drawer.⁵

Rights and liabilities of a drawee.

It is the right of the drawee to refuse to accept a hundi in certain circumstances. If the funds of the drawer are in the hands of the drawee and there is no other valid reason for non-acceptance the drawee will be liable for damages, but if the funds of the drawer are not in his hands he may or may not accept the hundi.

The holder of a bill is entitled to require an absolute and unconditional acceptance, *i. e.*, an acceptance according to the tenor of the bill. It is, however, competent for the holder to accept a qualified acceptance under sec. 86 of the Indian Negotiable Instruments Act, but if he does so, he takes it at his own risk and discharges all prior parties to himself, unless he obtains their consent. Four kinds of qualified acceptance are mentioned in sec. 86.

(a) Where it is conditional, declaring the payment to be dependent on the happening of an event therein stated;

(b) where it undertakes the payment of part only of the sum ordered to be paid;

II. Liability to enter particulars of a hundi

III. Secondary liability of the drawer after acceptance of the hundi.

Rights of a drawee.

I. Right to refuse when funds of the drawer not in hand.

1. (1892) 61 L. J. Q. B. 446.

2. Shadi Ram vs. Prij Raj 13. P. R. 1871.

3. 2 S. L. R. 11; A. I. R. 1930 Sindh. 4.

4. 59 I. C. 606.

5. A. I. R. 1927 Lah. 72.

(c) where, no place of payment being specified on the order, it undertakes the payment at a specified place, and not otherwise or elsewhere; or where, a place of payment being specified in the order, it undertakes the payment at some other place and not otherwise or elsewhere;

(d) where it undertakes the payment at a time other than that at which under the order it would be legally due.

II. Right to production of the hundi.

The drawee may insist on the production of the bill for acceptance and may decline to accept, if it is not produced.¹

III. Right to get back the hundi on payment.

The drawee is entitled to the delivery of the instrument after payment and if the instrument be lost the holder may be called upon to furnish a duplicate of the hundi which is called "*peth*" and the drawer is bound to supply the "*peth*". Should the duplicate be also lost a triplicate copy might similarly be obtained and it is called "*perpeth*". The drawee after paying the hundi cancels the same and then it is called "*khokha*".²

IV. Right to get time for consideration.

Under section 63 of the Negotiable Instruments Act the drawee is entitled to 48 hours of time in order to make up his mind about the acceptance of the hundi. This time, however, differs in various places according to local usages.

V. Right to re-issue the bill before maturity.

Under section 90 of the Negotiable Instruments Act the right of action on bills in acceptor's hand are extinguished on or after maturity. If a payment is made by the maker or acceptor before maturity, he must get the bill or note delivered over to him, in which case, he can re-issue the instrument so as to make himself and all subsequent parties liable.³

Liabilities of a drawee

1. Liability to pay after acceptance.

A drawee after acceptance is bound to pay the amount of the bill on maturity according to the tenor of the bill to the holder thereof. It is only the drawee who can be an acceptor except in need or for honour. After acceptance the drawee becomes liable as the principal debtor.

II. Liability in case of forged endorsement.

2. An acceptor of a bill of exchange is not relieved from liability by reason of the endorsement being forged,

1. Sec. 61 The Negotiable Instruments Act.

2. 7 B. H. C. R. 2.

3. Morley vs. Curvelwell (1840) 7 M. & W. 174; Attenborough vs. Mackenzie (1856) 25 L. J. Exch 244.

if he knew or had reason to believe the endorsement to be forged when he accepted the bill.

There are certain special liabilities of a drawee of a shah jog hundi.

3. The drawee ought not to pay shah jog hundi unless the name of the shah is endorsed on it at the time of presentation.¹ III. Liability to pay only to a shah.

4. It is the duty of the drawee to make due and proper enquiries about the position and the respectability of the shah before making payment to him. If the drawee fails in his duty to do so, he will be liable to the rightful owner of the hundi for the full consideration of it.² Similarly the drawee would be liable if the amount of the hundi has been paid through negligence and carelessness, for example, with the knowledge and in express violation of a telegram counter-manding payment until further instructions, as the payment in such a case would not be payment in due course.³ IV. Liability to enquire into the position of a shah.

5. In as much as according to usage, acceptance is not generally written across a shah jog hundi an additional degree of liability is imposed on the acceptor to make enquiries into the position of the shah. V. Additional liability in case of shah jog hundi.

6. In case of forgery the drawee should give immediate notice about it to the shah in order to make him liable. If the drawee is guilty of laches the shah may escape his liability in respect of a hundi on the ground of laches.⁴ VI. Liability in case of forged hundi.

Rights and liabilities of an acceptor for honour.

If a hundi is dishonoured by the drawee any person not already liable under the hundi can accept it for the honour of any party to the hundi. The position of an acceptor for honour is different from that of an ordinary acceptor. An acceptor undertakes to pay the bill on maturity. The acceptor for honour has no such undertaking. The conditions under which an acceptor for honour may be charged are specified in sec. 112 of the Negotiable Instruments Act which runs as follows:—

“An acceptor for honour cannot be charged unless the bill has at its maturity been presented to the drawee for payment, and

-
1. Daulat Ram vs. Bulakidas 6 Bom. H. C. R. 24.
 2. Ganeshi Das vs. Lachmi Narain (1894) 18 Bom. 570.
 3. Lalla Mal vs. Keshodas (1904) 26 All. 493.
 4. Daulat Ram Shriram vs. Bulakidas (1869) 6 Bom. H. C. R. 24, Bansidhar vs. Jwala Prasad (1914) 16 Bom. L. R. 434 at p. 440 R. D. Sethna vs. Jwala Pd. (1914) 16 Bom. L. R. P. 972 at p. 976.

has been dishonoured by him, and noted or protested for such dishonour."

Thus four conditions must be fulfilled before a hundi can be accepted for honour, namely, (a) that the payment should have been refused by the drawee, (b) that the hundi should have matured, (c) that it should have been noted or protested for such dishonour, and (d) that it should be presented for acceptance for honour not later than the day next after the day of its maturity.

The rights and liabilities of an acceptor for honour are provided for in sec. 111 and 114 of the Negotiable Instruments Act.

Sec. 111:—

"An acceptor for honour binds himself to all parties subsequent to the party for whose honour he accepts to pay the amount of the bill if the drawee do not; and such party and all prior parties are liable in their respective capacities to compensate the acceptor for honour for all loss or damage sustained by him in consequence of such acceptance."

Sec. 114:—

"Any person so paying is entitled to all the rights, in respect of the bill, of the holder at the time of such payment, and may recover from the party for whose honour he pays all sums so paid with interest thereon and with all expenses properly incurred in making such payment."

From these two sections it is clear that the acceptor for honour takes up the same position as that of the party for whose honour he accepts. If he accepts for the honour of a holder of the bill he is as much liable to all prior parties and has the same rights against all subsequent parties as that of the holder. If he accepts for the honour of the drawer he steps into his shoes except that he can recover the amount paid from the drawer and can set up the plea of forgery of the drawer's signature.¹

Where the drawee in case of need is named in a bill of exchange or in any endorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee.² A drawee in case of need may accept and pay the bill of exchange without previous protest.³

Rights and duties of a holder.

If a bill is lost before maturity, the holder can apply to the drawer to give him a duplicate, giving, if

Rights of a holder

I. To get duplicate of a lost bill.

1. Sec. 117 Evidence Act.
2. Sec. 115 Negotiable Instruments Act.
3. Sec. 116 Negotiable Instruments Act.

required, security to the drawer to indemnify him against all claims in case it is found. The drawer is not bound to give a duplicate of a lost bill until the holder guarantees him against any future demand, and duplicate need not be paid if the original has been duly paid. Even a custom to the contrary cannot be given effect to.¹

If the drawer on such request refuses to give the duplicate, an action will lie against him to compel him to give a new bill.²

According to sec. 39 of the Indian Negotiable Instruments Act after a bill is accepted the other parties are discharged of their liability, but the holder may expressly reserve his right to charge the other parties, and in such a case they are not discharged. The general rule about discharge is given in secs. 134 and 135 of the Contract Act.

II. Right to reserve right against surety

Section 134:—

“The surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released, or by any act or omission of the creditor the legal consequence of which is the discharge of the principal debtor.”

Section 135:—

“A contract between the creditor and the principal debtor by which the creditor makes a composition with, or promises to give time to, or not to sue the principal debtor discharges the surety unless the surety assents to such contract.”

The rule contained in sec. 39 of the Negotiable Instruments Act is an exception to this general rule. There may be cases where the holder may enter into contracts of composition with the drawee but at the same time may reserve his rights against the prior parties who stand in the position of sureties.

Ordinarily if the holder of a bill agrees with the acceptor to give time for payment³ or takes in lieu of payment a new bill payable at a future day⁴ or delays at the request of the acceptor in presenting the bill for payment⁵ the drawer and the endorser of the bill are discharged. When the holder enters into a contract with a third person

1. *Indra Chandra Deogar vs. Lachmi Bibi* 15 W. R. 501.

2. *King vs. Zimmerman* (1871) L. R. 6 C. P. 466.

3. *Indian Contract Act, Sec. 135; Askaran Baid vs. Pir Bux*, 8 C. L. J. 163; *Mohendro Lall Bose vs. Jadhav Kissen Singh*, 14 W. R. (A. O. J.) 5, 7; *Hari Mohan Bysack vs. Krishna Mohan Bysack* 17 W. R. 442, 444.

4. *Gould vs. Robson* (1807) 8 East. 576; *Goldfarb vs. Barlett* (1920) 1 K.B. 639, 648.

5. *Latham vs. Chartered Bank of India* (1874) L. R. 17 Eq. 205.

to give time to the principal debtor, the drawer and the endorser who are in the position of sureties are not discharged.¹ Mere forbearance on the part of the holder to sue the acceptor does not discharge the sureties² and similarly a promise to give time unsupported by consideration, and hence not enforceable, does not discharge the surety.³ There is a difference of opinion on the question whether forbearance to sue the principal debtor till after the expiry of the period of limitation discharges the sureties; the preponderance of view seems to be that it does not.⁴

Instances of
composition.

If the holder accepts a deed by the principal debtor conveying all his properties in trust for the benefit of the creditors, which impairs the remedy of the surety against the principal debtor, the surety is discharged.⁵ A covenant not to sue the acceptor at all or not to sue him for unlimited time discharges the endorser and the drawer.⁶ Acceptance of interest in advance as a general rule is construed as a contract with the debtor not to sue him during the time for which the interest is prepaid, and such an act discharges the surety.⁷ The mere fact of prepayment of interest is only a circumstance. It is not a conclusive evidence of a contract to give time.⁸ Mere part payment to a holder does not mean that the party liable is discharged from paying the remainder. Where, however, the holder in receiving the part payment releases or gives time to the principal debtor for the rest, the surety is discharged.⁹

In all the cases recited above if the holder enters into contract with the acceptor specifically reserving his rights against the sureties they are not discharged. It is immaterial whether the surety is informed of the contract or not. All that is essential is that the rights of the surety should not be impaired.¹⁰

1. Indian Contract Act, sec. 136.

2. Indian Contract Act, Sec. 137.

3. Damodar Das vs. Mohammad Hussain 22 All. 351.

4. Subramania vs. Gopala, 33 Mad. 308; Hajarimal vs. Krishna Row, 5 Bom. 647; Sankana vs. Virupakshapa, 7 Bom. 146; Krishto vs. Radha, 12 Cal. 330; Mathewson vs. Ram Kanai Singh 16 I. C. 387 (Cal.); Carter vs. White (1883) 25 Ch. D. 666, 672; but see Ranjit Singh vs. Naesbat 24 All. 504.

5. Pogose vs. The Bank of Bengal, 3 Cal. 174.

6. Indian Contract Act, Sec. 135.

7. Kali Prasanna vs. Ambica Churn, 9 B. L. R. 261; Protab Chundra Dass vs. Gour Chunder Roy, 4 Cal. 132 (on appeal to P. C.) 6 Cal. 241.

8. Rayner vs. Fussey, (1859) 28 L. T. Ex. 132; Punchanun vs. Daly 15 B. L. R. 331.

9. Gould vs. Robson, (1807) 8 East 576.

10. Bailey vs. Edwards (1864) 4 B & S. 761 : 34 L. J. Q. B. 45.

This right is conferred on the holder by sec. 17 of the Negotiable Instruments Act which is as follows:—

III. Right to treat ambiguous instruments as bills or notes.

“Where an instrument may be construed either as a promissory note or bill of exchange, the holder may, at his election, treat it as either, and the instrument shall be, thenceforward, treated accordingly.”

Under section 10 of the Negotiable Instruments Act “payment in due course” means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

IV. Right to receive payment

Three requirements must be fulfilled in order to constitute payment in due course.

(a) Payment must be according to the tenor of the instrument. Payment before maturity is not in accordance with the tenor.¹ It should be on maturity and in money only.² In case of a shah jog hundi payable to a shah the payment should be only to a respectable person, a payment otherwise would not be in accordance with the directions of the hundi.

(b) Payment should be made only to a person authorised to take payment.

(c) Payment should be made to a person who is either a payee or an endorsee. Due enquiry should be made as to whether the person paid is entitled to payment. If payment is made to a wrong person without enquiry it is not payment in due course.

Under section 78 of the Negotiable Instruments Act a bill of exchange can only be discharged by payment to the holder of the instrument. The question arises as to who are the persons entitled to receive payment either as holders of the instrument or on their behalf.

(i) Agent of the holder:—

Payment may be made to the holder of the instrument or his authorized agent. A bank holding a bill for collection with a lien upon it is entitled to receive payment so as to give discharge to the maker or acceptor of it.³ The position of the agent is very important and his rights and liabilities would be discussed later on.

Persons entitled to receive payment.

1. 9 C. W. N. 841 & 5 Cal. 654.

2. (1840) 7 M & W 174.

3. Royal Bank of Scotland vs. Rahim 49 Bom. 270.

(ii) Payment to a beneficiary:—

There is great difference of opinion as to whether payment to a beneficiary can be a ground for discharge of the hundi and in case of non-payment whether a beneficiary can sue on the instrument as the real owner. The Madras High Court and the Judicial Commissioners' Court at Nagpur are of the view that the holder of a note even if benamidar can sue upon it.¹ The Bombay High Court is of the same view.² The Calcutta High Court has gone so far as to hold that the real owner cannot sue even if the benamidar is a party to the suit.³ In another case, however, it was held that a firm can sue on a pronote standing in the name of a partner.⁴ The Patna High Court took a different view. It was held that the beneficiary though not a holder of the pronote can sue upon it.⁵

The Allahabad High Court in one case endorsed the view of the Madras High Court⁶ but it modified its view in a later case.⁷ It was held that where a promissory note is executed in favour of one person in lieu of consideration advanced by another, the promisor cannot pay to the latter and get rid of the liability. But in a suit brought by the real holder to which the debtor and the holder of the promissory note are parties, a decree can be passed against the debtor for what is due from him with a clear proviso that payment shall be made by the debtor to the holder or to his credit and that it be made by deposit in court if money is recovered in execution and it shall be to the credit of the holder. Most of these cases are on promissory notes but the principle applies to Hundis as well.

(iii) Guardian of a minor:—

If the instrument stands in the name of the guardian of a minor it is the guardian who is the holder

1. Rama Niya Ayyangar vs. Sada Gapa Ayyangar 28 Mad. 205, also 21 Mad. 391; Subha Narain vs. Rama Swami 30 Mad. 89. Vishnu vs. Achut 105 I. C. 780 (Nagpur); Gulabgir vs. Nathu Mal A. I. R. 1932 Nag. 23.

2. Bamdo vs. Jamlen 12 Bom. L. R. 801.

3. Har Kishore Barna vs. Gura Mia Chowdhri A. I. R. 1931 Cal. 387.

4. Broja Lal vs. Budhnath A. I. R. 1928 Cal. 148.

5. Surajman Pd. vs. Sadanand A. I. R. 1932 Pat. 346 Sarjug Singh vs. Deo Saran A. I. R. 1930 Pat. 313.

6. Reoti Lal vs. Manna Kuar A. I. R. 1922 All. 70 following 28 Mad. 205 and 13 A. L. J. 695.

7. Sewa Ram vs. Hoti Lal 1930 A. L. J. 1509 : 53 All. 5 : A. I. R. 1931 All. 108.

and payment to the minor will not discharge the instrument.¹

(iv) Joint holders:—

If two or more holders are partners, payment to one of them would be a valid discharge as against the others for each partner occupies the position of an agent of the others. There may be cases when they are not partners. Under sec. 45 of the Contract Act where there are two or more joint promisees the right of action rests with all of them jointly. Only one of them cannot claim performance without joining the others. From this it may be argued that if one of them has no right to enforce the contract he can much less give a valid discharge as against the others. The Madras High Court, however, basing its reasoning on sec. 38 of the Contract Act has held otherwise.² It was held that payment to one of the joint creditors extinguishes the liability of the debtor completely.

If the joint holders are members of a joint Hindu family the manager can undoubtedly give a valid discharge to the debtor of the family.³

Where there are two or more drawees the holder is entitled to acceptance by all of them. If one of them refuses to accept he may treat the bill as dishonoured.⁴

V. Entitled to acceptance by all the drawees

If the bill is dishonoured, the holder has an immediate right of recourse against all prior parties, namely, the drawer and the indorser of the instrument. Before he can proceed the notice of dishonour is absolutely necessary. Until such a notice is given the holder has no cause of action against them.⁵ The doctrine of notice of dishonour is based upon just and equitable principle and it has been applied to hundi transactions as well⁶ unless there is a local usage to the contrary.

VI. Right in case of dishonour.

1. Ramanuja Ayyangar vs. Sadagopa Ayyangar 28 Mad. 205; Dorai Lal vs. Sewak Ram 13 A. L. J. 695.

2. Barber Maran vs. Ramana Goundan 20 Mad. 461; Annapurnamma vs. Akkayya, 36 Mad. 544 (F. B.) Peri Ramasami vs. Chandra Kottayya 47 M.L.J. 840. See Srinivas Das vs. Meher Bai, 41 Bom. 300 (P. C.).

3. Veliet Das vs. Bunarussee Roy (1864) W. R. 262.

4. Cf. Bill of Ex. Act, Sec. 41 (6) Daniel, Sec. 455.

5. Ram Ravji Jambhekar vs. Pralhaddas Subkaran, 20 Bom. 133; Mulchand Johrimal vs. Sugarchand Shivdas 1 Bom. 23; A. B. Miller vs. The National Bank of India 19 Cal. 146.

6. Moti Lal vs. Moti Lal 6 All. 78, 81; Ram Ravji Jambhekar vs. Pralahaddas 20 Bom. 133.

VII. Right to refuse acceptance from an agent.

The holder is not bound to agree to an acceptance by the agent, as such an acceptance would multiply difficulties for the holder in proving it.¹ If however the agency be clear he would be bound to take the agent's acceptance.

VIII. Entitled to fill up blanks in the instrument.

The holder is entitled to fill up the amount, the date or any other requirement if the hundi be incomplete but it must be done strictly in accordance with the authority given to the holder. If the holder exceeds the authority in filling up the blanks he can derive no benefit from it.

IX. Right of a holder in case of defective hundis

If the holder takes a bill with notice of its defects he only acquires the rights of his transferor. Notice affecting the holder in taking a negotiable instrument must exist at the time when he acquires the paper. Subsequent notice will not affect his right. If a person becomes possessor of a bill for no consideration and afterwards gets notice of the defects he cannot improve his position by paying the consideration subsequently, so as to turn his position into that of a holder in due course. The holder takes the bill subject to all the equities. If a holder takes an instrument with notice of dishonour, or after maturity, he takes it solely upon the credit of his transferor and cannot complain if he is subjected to equities arising on the instrument.² The equities to which the holder is subjected, must exist on the date of the transfer and should not arise subsequently or even collaterally.³ Partial or total failure of consideration or partial payment may be pleaded against the holder; but set off is not to be treated as an equity arising on the instrument.⁴ Similarly if a holder takes a bill after maturity he takes it subject to all the equities.

Duties of a holder.

1. To give notice of the loss of the instrument.

If a bill is lost before maturity the holder should apply to the drawer to give a duplicate and if the drawer requires him to give a security to indemnify him against all claims, in case it is found, the holder should furnish such a security. A drawer is not bound to give a duplicate of a lost bill without a guarantee against future demand from the holder.⁵

II. To present the bill for payment even in case of loss

Even if a bill is lost the holder must obtain a copy and present it for payment on the due date.⁶ Even if the

1. Coore vs. Callaway, (1794) 1 Esp. 115.

2. Hazari Mull Nahatta vs. Sobagh Mull Duddha, 9 B. L. R. 1.

3. Harry Van Ingen vs. Dhunna Lall Lallah 5 Mad. 108.

4. Harry Van Ingen vs. Dhunna Lall Lallah 5 Mad. 108, 112.

5. Inder Chundra Dooger vs. Lachmee Bibee 15 W. R. 501

6. Udho Ram vs. Hemraj A. I. R. 1924 Lah. 198.

holder had notice that the bill would not be paid when presented still it is the duty of the holder to present the bill. If, however, the drawer too had such notice and he promised the holder to pay the money on the due date it will excuse the holder from presenting the bill.¹ Even if the acceptor makes a declaration of his inability to pay before the holder and the drawer, still it would not dispense with the presentment of the hundi.² Impossibility of presentment of the hundi will, however, be a valid excuse for its non-presentment as happened in the case of last war.³ In the case of last war two Imperial Acts XIV of 1916 and XIX of 1917 were passed to provide for this exigency. It was provided by these Acts that bills of exchange payable outside British India will be in force during the continuance of the war and even six months after it.

It is the duty of the holder to present the bill for acceptance either himself or through his agent as is provided in sec. 61 of the Indian Negotiable Instruments Act.

III. To present for acceptance.

If no address of the drawer or drawee is given in the hundi, it is the duty of the holder to diligently search for them and make enquiries about them and their place of business or residence. What is reasonable search is a question of fact. Usually he should make enquiry from all persons connected with the transaction and who are likely to know the whereabouts of the drawer and the drawee.

IV. To make due search for the acceptor.

On dishonour of the bill by the drawee the holder at once gets a right of action against the drawer. He is not bound to take acceptance for honour. By waiting to take acceptance for honour he waives the right which accrues to him on dishonour by the drawee and during this period the drawer may become insolvent. It is for this reason that the holder is not bound to take acceptance for honour. It is optional for him to do so if it suits him.

V. Holder not bound to take acceptance for honour.

There is no express provision in the Negotiable Instruments Act giving the consequences of non-acceptance of payment for honour. Under the English law the holder loses his rights against any party who would have been liable in the case of non-payment of the bill. From the

VI. Bound to accept payment for honour.

1. *Prideaux vs. Collier* (1817) 2 Stark 57.

2. *Baker vs. Birch* (1811) 3 Camp. 107.

3. *Patience vs. Townley* (1805) 2 Smith 223; *In re Franche & Rasch* (1918) 1 Ch. 470.

wordings of sec. 108 we can safely infer that the law should be the same in India.

VII. Liability of a holder in case of defective hundis.

In the case of a 'shah jog' hundi the position occupied by the shah is that of a holder. The holder, however, occupies a better position in the case of a 'shah jog' hundi in cases of forgery. In the case of a stolen or a forged hundi as a general rule the holder is liable to refund the money to the payer. The shah guarantees the genuineness of the hundi and therefore if the hundi turns out to be forged or contains forged endorsement, the shah is liable to refund the amount of the hundi even though he should be a bona fide buyer of the hundi for full consideration. He escapes his liability only (a) by tracing the hundi to its source, that is, by producing the actual forgerer¹ or (b) if no reasonable notice of the fact of the forgery has been given to him. Tracing the hundi to its source is the literal translation of the words "*awwal manzil pahunchana*" found in the rules of the Marwari Punch Sarrafs Association at Bombay. This is a very well established and old custom. It has been taken to mean that the shah is relieved of the responsibility by producing the actual forgerer. It is in this respect that a shah occupies a superior position than an ordinary holder.

Privileges of a 'holder in due course.'

1. If a person should sign and deliver a duly stamped hundi to a 'holder in due course' but the instrument should be inchoate, the 'holder in due course' will be presumed to have a prima facie authority to fill up the amount upto which the stamp should suffice. (Sec. 20 of the Negotiable Instruments Act).

2. If a bill of exchange, drawn in a fictitious name and payable to the drawer's order, is accepted, the acceptor is precluded from denying his liability to the 'holder in due course' on the ground that the bill is drawn in a fictitious name. (Sec. 42).

3. Where a bill is negotiated and delivered to a 'holder in due course' the other parties to the bill cannot be allowed to say that the delivery of the instrument was conditional and for special purpose only. (Sections 46 and 47).

4. The parties to a bill of exchange cannot set up

1. Daulat Ram vs. Bulaki Dass (1869) 6 Bom. H. C. R. 24; Ganesh Dass vs. Lakshmi Narain (1894) 18 Bom. 570; Bhupat Ram vs. Hari Prio (1901) 5 C. W. N. 313; Lallah Mal vs. Keshav Dass (1904) 26 All. 493; R. D. Sethna vs. Jwala Prasad Gaya Prasad (1914) 16 Bom. L. R. 972 and 50 Bom. 765.

the plea as against the 'holder in due course' that the instrument has been stolen or obtained by unlawful means such as fraud, or is for unlawful consideration. (Sec. 58).

5. Every holder is presumed to be a 'holder in due course.' (Sec. 118).

6. No maker or acceptor of a hundi or a bill of exchange can be permitted to deny the validity of the instrument as against the 'holder in due course.' (Sec. 120).

7. No drawer or acceptor of a bill of exchange can be permitted as against the 'holder in due course' to deny the payee's capacity on the date of the bill or on the date of the endorsement. (Sec. 121).

Rights and liabilities of an agent.

Agents may be of two kinds, general and special. There is vital distinction between them.¹ Special agency is actually given and the agent is bound by the limits placed on the actual authority given.² The general agent binds the principal by all acts done by him in the course of his employment and within the scope of the general authority. It is immaterial that the acts of the agent are in violation of the private orders given by the principal.³

Rights of an agent,
1. Right to bind the principal.

The powers given to an agent may be express or implied. Under sec. 27 of the Negotiable Instruments Act a general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting and endorsing bills of exchange so as to bind his principal, nor does an authority to draw bills of exchange by itself import an authority to indorse. Even a full power of attorney to act as mercantile agent does not empower him to draw or endorse bills.⁴ Similarly the manager of a silk factory cannot execute bills for the purposes of the company unless he is specially authorized to do so under his power of attorney.⁵ Where the payee of a certain bill gave a power of attorney to an agent to sell, endorse and assign, the authority of the agent was upheld though he endorsed only by way of security for a loan

1. Venkataramana Iyer vs. Narasinga Rao 38 Mad. 134.

2. Fenn vs. Harrison, (1790) 3 T. R. 757; East India Co. vs. Hensley, (1795) 1 Esp. 112.

3. Smethurst vs. Taylor, (1844) 12 M & W 545; Bryant Powis and Brayant vs. La Banque du Peuple, (1893) A. C. 170; Edmunds, P. O. vs. Bushell (1865) L. R. 1 Q. B. 97.

4. Pestonjee Nusservanjee Bottlewallah vs. Gool Mahamed Sahib, 7 M. H. C. R. 369; Cf. Cunningham & Co., Ltd., Inre (1887) 36 Ch. D. 532.

5. Ferguson vs. Um Chand 33 Cal. 343, 347.

Advocate High Court

Jammu & Kashmir

Srinagar.

given to him.¹ An agent acting in a mala fide way does not bind the 'holder in due course.'² The holder would be bound if he should be aware of the agent's mala fides.³

The implied authority conferred on an agent might be inferred from the circumstances of the case. If an agent signs a bill but the principal having knowledge of it stands by and tacitly concurs in the act he will be bound by the act of the agent.⁴ If the course of employment of the agent be such and the principal should repeatedly recognise the acts done by the agent, the principal would be bound. Where the agent accepted bills in the name of his principal and the bills were paid by the principal it was held to be a piece of evidence of implied authority to accept the bills.⁵ If the agent had drawn or endorsed bills on previous occasions, in order to raise a presumption of implied authority it must be shown that the principal had knowledge of those facts.⁶

It is a settled principle of commercial law that no evidence is admissible to charge any person as a principal to an instrument, unless his name is disclosed on the instrument in such a way that on fair interpretation his name is the name really liable on the bill.⁷ In a hundi drawn by a person describing himself as the superintendent of the private treasury of His Excellency Maharaja Kishan Prasad without disclosing that any other person was liable as principal, the drawer was held personally liable and no liability was fixed on the Maharaja.⁸ The general rule is that parol evidence can be adduced to charge the principal for the acts of an agent acting for an undisclosed principal. The rules relating to negotiable instruments are stricter. The use of the words "in his name" found in secs. 27 (a) indicate that the principal's name must be described in the signatures of the agent. This is to give greater security to the negotiable instruments which are transferred to successive holders. This rule is based on the well established usages governing the law-merchant.⁹ It is not nece-

1. Bank of Bengal vs. Moleod 5 M. I. A. 1; Bank of Bengal vs. Fagan 5 M. I. A. 27; Bank of Bengal vs. Ramanathan Chetty 43 Cal. 527 (P. C.).

2. Janamanjoy Chandoo vs. Watson (1884) 9 A. C. 561; Bryant Powis and Brayant vs. La Banque du Peuple (1893) A. C. 170 see Brocklesby vs. Temperance Permanent Building Society (1895) A. C. 173.

3. Mutty Lal Seal vs. Launcelot Dent 5 M. I. A. 328.

4. Barlow vs. Bishop (1801) 1 East 432; Lord vs. Hall (1849) 8 C. B. 627.

5. Bank of Bengal vs. Ramanathan Chetty 43 Cal. 527.

6. Davidson vs. Stanley (1841) 7 M & Gr. 721.

7 & 8. Sad Suk Janki Das vs. Kishan Prasad 46 Cal. 663 (P. C.).

9. Subba Narayanan Wathiar vs. Ramasami Ayyar 30 Mad. 88, 91 (F. B.)

ssary that the agent should include the actual name of the principal in his signatures. He may use only an adopted name. In South India there is a custom among Nattukottai Chetties who trade under names made up of a series of initials to indicate firm transactions by prefixing the firm's initials to the name of the signatory.¹

If a bill stands in the name of a firm and only one of the partners signs the bill in the name of the firm all the other partners whether working, dormant, or secret, are liable, provided the bill is incidental to the business of the firm.² This principle is based on the proposition that each partner is an agent of the other partners.

Agent of a mercantile firm.

The Karta of a joint Hindu family can draw a bill for the purposes of the family business so as to bind the junior members of the family.³ It is immaterial that the manager should have drawn the bill for a purpose unconnected with the business or to defraud the other members.⁴ The manager, however, cannot impose any liability on the other members for a new business started by himself.⁵ Similarly where a Hindu widow succeeds to the trade of her husband and incurs debts on the credit of the business of her husband, such debts are recoverable out of the assets which come in the hands of the reversioners.⁶

Joint Hindu family trade.

An agent is entitled to receive payment on behalf of his principal but the payment should be in cash or anything recognised as legal tender.⁷ In the case of a 'shah jog' hundi which is sent for realization to an agent the agent is entitled not only to receive payment but can also sue the drawee or the acceptor. Such an endorsement is in the nature of restrictive endorsement which if accompanied with the delivery of the hundi gives the endorsee right to sue the acceptor but not to transfer his rights as endorsee to anybody else.⁸

II Entitled to receive payment on behalf of principal.

1. Muthar Sahib Maraikar vs. Kadir Sahib Maraikar 28 Mad. 544; Mungumall Jessa Singh vs. V. A. L. V. R. C. T. Firm 4 M. L. T. 309; Binde Kishore Goswami vs. Ashutosh Mukherjee 16 C. W. N. 666:14 I. C. 720; Ghulamsa Ravuthar vs. Visvanatham Chettiar, (1917) M. W. N. 344.

2. Bunarasee Dass vs. Gholam Hussein 13 M. I. A. 358, 363; Sobhomal Khairajmal vs. Pohumal 5 S. L. R. 168:13 I. C. 255.

3. Raghunathji Tarachand vs. Bank of Bombay, 34 Bom. 72; Snaka Krishnamurthi vs. Bank of Burma 35 Mad. 692; Indian Contract Act Sec. 247 V. S. V. Subharaya vs. Thangavelu 45 M. L. J. 44.

4. Ganpat Rai vs. Munnu Lal 34 All. 135.

5. Sanyasi Charan Mandal vs. Krishnadan 49 Cal. 560; Tadibulli Tam-mireddi vs. Gangireddi, 45 M. 281 (P. C.)

6. Sakarabhai vs. Magan Lal 26 Bom. 206; Sanka Krishnamurthi vs. Bank of Burmah 35 Mad. 692, 698; South Indian Export Co. Ltd. vs. Subbier 28 M. L. J. 696 Tanikachala Muddaliar vs. Alamelu Ammal, 16 M. L. T. 26.

7. Morley vs. Culverwell, (1840) 7 M & W. 174, 180.

8. Bhupat Ram vs. Hari Prio (1901) 5 C. W. N. 313.

III. Entitled to receive notice on behalf of the principal.

Agent exceeding his authority.

An agent is entitled to receive notice of dishonour or of defects in the instrument on behalf of his principal. Notice to the agent is notice to the principal.¹ This doctrine however, cannot apply when the agent himself is a party to the fraud practised on the principal or when it is to his interest not to disclose the fact to his principal.²

As a general rule the principal is bound by all acts done by his general agent in the course of employment and within the limits of the authority given to him. Where the limit of the authority given by the principal is exceeded, the principal will not be bound by any act of the agent done in excess of the authority unless the principal by his own representation gives the appearance that the agent possesses a higher authority than he actually has.³ A person took a note from a partner of a non-trading firm for a sum higher than he was authorised to give. It was held that the payee could not recover from the firm even such amount as was within the authority of the partner for the contract was not capable of division.⁴ If an agent enters into a contract he impliedly represents that he has the authority to enter into such contract, but if he has actually gone beyond the scope of his authority he would be liable for the non-performance of the contract. It was at one time believed that in such a case the agent would be liable on the ground of fraud. Therefore if the agent believed in a bona fide manner that he had the authority which he represented to possess he would not be liable for any excess of authority.⁵ The view has now been changed. The liability of the agent is no longer based on the theory of fraud but upon an implied warranty given by the agent.⁶ Therefore even a bona fide belief in the possession of a false authority would not save the agent. An agent who untruly represents the extent of the authority given to him by the principal is as much liable as a person who represents himself as an agent while as a matter of fact he is not.⁷

1. *Dela Chaumette vs. Bank of England*, (1827) 9 B & C. 208; as explained in *Currie vs. Misa* (1875) L. R. 10 Ex. 153, 164.

2. *Texas Company vs. Bombay Banking Co.* 44 Bom. 139 (P. C.)

3. *Fearn vs. Felicia* (1844) 7 M. & Gr. 513; *Morison vs. London County and Westminster Bank*, (1914) 3 K. B. 356.

4. *Prembhai Hemabhai vs. T. H. Brown* 10 Bom. H. C. R. 319.

5. *Polhill vs. Walter* (1832) 3 B & Ad. 114.

6. *Starkey vs. Bank of England* (1903) A. C. 114; *Bank of England vs. Cutler*. (1908) 2 K. B. 208.

7. *Ganpat Prasad vs. Sarju*, 34 All. 168.

An agent can deliver the instrument on behalf of his principal. If the agent does so without authority the defect might be cured by ratification by the principal.¹

IV. Delivery of the instrument by the agent

An agent can endorse the bill on behalf of his principal. On this principle a partner can endorse a bill in the name of a firm though not in his own name.

V. Right to endorse for the principal

A drawee can accept a bill through an agent.² A holder, however, is not bound to acquiesce in an acceptance by the agent for such an acceptance would multiply the difficulty of the holder in proving it. If the agency be clear the holder would be bound to take the agent's acceptance.

VI. Right to accept for drawee.

The liability of an agent when he either misrepresents the factum of his authority or the extent of his authority is the same. He is liable even if he misrepresents with a bona fide intention. It has been dealt with before.

Liabilities of an agent.

I. When he exceeds his authority.

Liability of an agent signing is given in sec. 28 of the Negotiable Instruments Act. It runs as follows:—

II. Liability on signing an instrument

“An agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable.”

As a general rule the instrument must show on the face of it the names of the persons who are liable on it.³ A person who wants to sign merely as an agent of another must put in some words to indicate that his personal liability is to be excluded.⁴ In the case of a negotiable instrument it is not open to a signatory to prove that he was acting for an undisclosed principal.⁵ These rules not only apply to bills of exchange and other negotiable instruments but also to hundis.⁶ This section does not prescribe any particular form in which the agent is to sign. He must describe himself as an agent signing for the principal. In the following cases the liability of the agent was not excluded, for in the signatures it was not clearly indicated that the personal liability of the agent was meant to be excluded:—

1. Ancona vs. Marks, (1862) 31 L. J. Ex. 163.

2. Lindus vs. Bradwell, (1848) 5 C. B. 583; Edmunds vs. Bushell, (1865) L. R. 1 Q. B. 97.

3. 38 M. 482 F. B.; 36 M. 362; 46 C. 663 P. C.; 41 M. 815; (1932) Bom. 607.

4. 50 M. L. J. 125.

5. 46 C. 663; 30 M. 88.

6. 14 M. L. T. 502.

(a) A bill signed A. B., C. D., E. F., Directors, X and Co. Ltd.¹

(b) We the directors of X and Co. Ltd., promise to pay Rs. 5,000/- A. B. C. D.²

(c) A note signed A. B., Manager of C. D., or Managing Proprietor of A. B.³

(d) K. P., Superintendent of the private Treasury of H. H. the Maharaja.⁴

(e) A bill endorsed C. D., agent.⁵

(f) Hundi signed "Mohan Lal acting superintendent of the Prime Minister of His Highness the Nizam."⁶

Local usages to exclude the liability of agent

In certain places there are local usages by which the liability of the agent is excluded. In Dacca it was customary for *Gumashtas* to draw bills on their principals without thereby incurring liability for the defections of their principal.⁷ In Sindh it has been held that the prefixing of the word "*Dashkhat*" to the signatures denotes that the person incurs no liability on the instrument.⁸ In Punjab a drawer of a bill of exchange or hundi by crossing the bill with the word "*Sreenishani*" is deemed to relieve himself from any personal liability.⁹ In South India it is the practice of native merchants to indicate firm transactions by prefixing to their signatures the initial of the firm's name, and evidence was admitted to show whether by the use of these initials the bill was signed on behalf of the firm or not.¹⁰

Where a person induces an agent to sign an instrument in a form which does not exclude the liability of the agent he cannot take advantage of his own fraudulent conduct.¹¹ This rule is founded on the doctrine of estoppel.

Agent for collection.

Where a hundi was drawn in favour of the plaintiff and was endorsed in favour of a third person for collection

1. 52 C. 804 (*Sreelal Manghulal vs. Lister Antiseptic Company*).
2. See 38 Mad. 482.
3. 52 Bom. 640.
4. *Sadsuk vs. Kishan Prasad* 46 Cal. 663 P. C.
5. (1922) 1 K. B. 518, A. I. R. 1923 Cal. 407.
6. *Sreelal vs. The Lister* 52 Cal. 802 following 46 Cal. 663 P. C.
7. *Hareemohan Bysack vs. Krishno Mohan Bysack* 17 W. R. 442.
8. *Silleman Datto vs. Iso Wad Muso* 2 S. L. R. 11.
9. *Shadi Ram vs. Arji Raj* 13 P. R. 1871.
10. *Muthar Sahib vs. Kadir Sahib* 28 Mad. 544; *Mungumal vs. A. L. V. R. C. T. Firm* 4 M. L. T. 309; *Natesa Ayyar vs. Satayya Pillai* 8 L. W. 622.
11. *National Bank of Upper India vs. Bansidhar* 92 I. C. 94.

and the amount was not collected, the plaintiff sued on the hundi which was not re-endorsed to him, it was held that the plaintiff was entitled to sue, as the endorsement was conditional and for specific purpose only.¹

A donee of a negotiable instrument is a holder but not a 'holder in due course.' He succeeds to the rights of his donor. Should the donor be a 'holder in due course' he, too, acquires all the rights of a 'holder in due course.' The donee, however, cannot sue the donor on the instrument.² He can sue prior parties subject to the equities attaching to the instrument in the hands of the transferor.³ He can negotiate the instrument, and his endorser, if he be a 'holder in due course', can sue the donor.

Rights of a donee

Having thus dealt with the rights and the liabilities of the parties, the next topic is the transfer of the instrument. Choses in action can be transferred by (a) assignment and (b) by negotiation. Assignment can be made in equity or under the Transfer of Property Act. In the case of an assignment, the assignee does not get a better title than the transferor. Negotiation, however, is a special form of transfer under which the transferor can confer a better title upon the transferee. The Negotiable Instruments Act deals with this form of transfer and it is called negotiation.

-
1. Cf. Bill of Ex. Act Sec. 35 (3).
 2. In Re Whitaker (1889) 42 Ch. D. 119.
 3. Easton vs. Prat Chitt (1835) 1 Cr. M & R. 798, 808.

CHAPTER VI.

HUNDI (CONTINUED)

Negotiation.

It is defined in sec 14 of the Negotiable Instruments Act thus:—

“When a promissory note, bill of exchange or cheque, is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.”

In English law debts are called “choses in action” as distinguished from personal chattel which are tangible. The Indian Transfer of Property Act has named some of them as actionable claims. The transfer of actionable claims is provided in secs. 130, 131 and 132 of T. P. Act.

Sec. 130:—

“The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent and shall be complete and effectual upon the execution of such instrument and thereupon all rights and remedies of the transferor whether by way of damages or otherwise shall vest in the transferee, whether such notice of transfer as is hereinafter provided be given or not.”

Sec. 131:—

“Every notice of an actionable claim shall be in writing, signed by the transferor or his duly authorized agent on his behalf or in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.”

Sec. 132:—

“The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of transfer.”

Thus it is clear that for such transfers three conditions are essential:—

- (i) The transfer must be effected in writing.
- (ii) Transferee should give notice to the debtor.
- (iii) The transferee is subject to all the liabilities of the transferor.

These provisions do not apply to negotiable instruments.

Negotiation is a special kind of transfer which confers special rights on the transferee.

- (1) The property in a negotiable instrument passes

by mere delivery, or in some cases by endorsement and delivery.

(2) The transferee in good faith and for consideration is not subject to any defect in the title of the transferor, or any prior party.¹

(3) The transferee can sue even without giving notice to the debtor.

(4) The passing of consideration is presumed unless proved otherwise. In the case of a 'holder in due course', want of consideration is no defence.²

Negotiation can be effected in two ways, namely, (a) by delivery and (b) by endorsement accompanied with delivery. The first kind of transfer is provided in sec. 47 of the Negotiable Instruments Act, and can only be made in the case of negotiable instruments payable to bearer. The hundi, not being an instrument payable to bearer, can be transferred only by endorsement followed by delivery of the instrument. In an old case³ it was held that under the Hindu law a hundi, payable to order, was negotiable by local custom without an endorsement by the payee.

This case has, however, been doubted, and it has been held that a hundi accepted by a drawee was assignable without any regular form of endorsement.⁴ As a general rule, hundi is always transferred by an endorsement as it affords greater safety and offers a larger amount of convenience. Negotiation by endorsement is provided in section 48 which runs as follows:—

"Subject to the provisions of section 58, a promissory note, bill of exchange or cheque payable to order, is negotiable by the holder by indorsement and delivery thereof."

Under this section, the instrument should be payable to order, which means that it should be payable to a specified person, or to the order of the specified person. Such instruments are negotiable by endorsements, and the instrument should be physically given over to the transferee. Both these conditions are essential. The nature of endorsement will be dealt with first, and then the subject of delivery.

There are several classes of indorsement.

(1) Blank or general.

Endorsement

1. Muhammad vs. Ranga Rao 24 Mad. 654.

2. Hazari Lal vs. Satesh Chandra 46 Cal. 502.

3. Rajroopram vs. Budhdhoo (1883) 1 Hyde 155; 1 Ind. Jur. 93.

4. East India Bank vs. Khoja Vullie Goolwany 1 Ind. Jur. (N. S.) 247.

- (2) In full or special.
- (3) Partial *i. e.* about a part of the amount of the instrument only.
- (4) Restrictive *i. e.* prohibiting further negotiation or restricting the endorsee to deal with the bill as directed by the endorser.
- (5) Conditional.
- (6) *Sans Recourse i. e.* where the endorser excludes his liability.

The Negotiable Instruments Act defines only two kinds of endorsements *i. e.* indorsement "in blank" and "in full."

Section 16 runs as follows:—

"If the indorser signs his name only, the endorsement is said to be "in blank," and if he adds a direction to pay the amount mentioned in the instrument to or to the order of a specified person, the endorsement is said to be 'in full' and the person so specified is called the "indorsee" of the instrument."

By an endorsement, ordinarily only the property in the instrument can be transferred. The debt is not transferred. An endorsement might operate as an assignment of the debt when it is so worded, and the provisions of Stamp Law are complied with. The endorsee of a promissory note, executed by the manager of a Hindu family, cannot sue the non-executant coparceners, unless the endorsement is so worded as to transfer the debt as well, and the Stamp Law is complied with.¹

Hundi is usually indorsed in full. Indorsement "in blank" is hard to find. In the Punjab, however, "*Sans recourse*" indorsement is called "*Sri Nishani*" indorsement. In the Punjab, a drawer of a bill of exchange or hundi, by crossing the bill with the words "*Sri Nishani*", is deemed to relieve himself of any personal liability in case the bill is subsequently dishonoured.²

An indorsement must fulfil the following conditions in order to be valid.

(a) Indorsement must be on the instrument either on its face or its back. If no space is left, a paper must be attached to it called "*allonge*" or a paper gummed at the end of the bill to provide space for indorsement.³ In-

1. S. Maruthamuthu Naicker vs. P. Kadir Badsha Rowther A. I. R. 1938 Mad. 377 F. B.

2. Shadi Ram vs. Prij Raj 13 P. R. 1871 Rattigan's Digest of Customary Law 336.

3. 22 W. R. 106.

dorsement should not be made on the copy of the bill.¹

(b) Only the maker or holder can make an indorsement. A stranger cannot do so.² He does not undertake any liability merely by putting his name on the bill. If, however, he guarantees payment he would be liable as surety.³

(c) It must be signed by the endorsee. The signatures might be made by putting initials or thumb marks. If the name of the indorsee is spelt inside the bill, the endorsee must sign accordingly.

(d) Endorser must either sign the instrument, or put in words showing the intention to indorse *e. g.*, Pay X, Pay X or order, etc.

The intention should be clearly expressed to transfer the instrument and to clothe the indorsee with the right to recover the money due under it.⁴ It may be restricted by conditions or might restrict further negotiation.

(e) With the indorsement the instrument must be delivered. The delivery must be by the indorser or his agent with the intention of passing property in the instrument.⁵

(f) Indorsement raises a presumption that the instrument is complete in every respect, but even blank instruments may be indorsed.

Indorsement leads one to three inferences (i) that the indorser has the right to the instrument (ii) that the bill is genuine at the time of indorsement and (iii) that the prior indorsements are valid.

The first essential requisite of the negotiation of a hundi is the endorsement. The second part, which is essential to complete the act of negotiation, is the delivery of the instrument.

Essentials of a valid delivery:—

1. It must be a physical transfer of the instrument.

Delivery is a voluntary transfer of possession from one person to another. The same may be of two kinds. It may be actual or constructive. Actual delivery is one in which there is a change of physical possession of the

Delivery of a hundi.

Nature of delivery

Actual delivery.

1. Ardesbir Sorab Shah vs. Khushaldas 32 Bom. 247, 248.

2. Thakersay vs. Kishan Das 76 I. C. 202.

3. Brijendra Kishore vs. Hinudstan Co-operative 44 Cal. 978.

4. 95 I. C. 704; 17 Mad. 461.

5. 5 Q. B. 475.

instrument. It must be handed over from one person to another. The delivery may be given either to the person entitled to have the delivery or to some one on his behalf.

Constructive
delivery.

In the case of constructive delivery the instrument is not handed over to the payee or endorsee but the possession in law is deemed to be that of the payee or endorsee. The person giving the delivery makes it clear by frank and open declaration of his intention to hold the instrument not on his own behalf but on that of the person who is entitled to have the instrument. The two illustrations given under sec. 47 of the Negotiable Instruments Act might profitably be quoted to show what an actual or constructive delivery is. Illustration (a) is an example of actual delivery and (b) that of constructive delivery,

Illustration (a):—A, the holder of a negotiable instrument payable to bearer, delivers it to B's agent to keep for B. The instrument has been negotiated.

Illustration (b):—A, the holder of a negotiable instrument payable to bearer which is in the hands of A's banker, who is at the time the banker of B, directs the banker to transfer the instrument to B's credit in the banker's account with B. The banker does so, and accordingly possesses the instrument as B's agent. The instrument has been negotiated, and B has become the holder of it.

2. It must be a voluntary and conscious act of both the parties.

Delivery is not valid if it is obtained by fraud or if the instrument is snatched away¹ by the endorsee from the hands of the endorser, for in that case the possession is not given to the endorsee voluntarily and intentionally. Delivery of the instrument to one's agent to be handed over to the transferee is no delivery.²

3. Delivery must be with the intention of passing the property in the instrument to the person to whom it is delivered.³

If the instrument is handed over without an idea of passing the property in it, it is not such a delivery as is sufficient to constitute complete negotiation. If a bill is handed over to a servant for safe custody, the servant

1. 57 M. L. J. (N. R. C.) 33.

2. (1836) 1 M and W 365.

3. 89 I. C. 461; 6 L. L. J. 230; Punjab National Bank vs. Balkishen Das 79 I. C. 476.

acquires no property in the bill. Evidence may be adduced to show the intention with which the delivery was made. In the case of acceptance it is not necessary for a completed acceptance that the instrument should be handed over to him if the acceptor gives notice of his signing to the holder or any other party liable on the bill.¹ Such an act is now considered as tantamount to constructive delivery.²

If the endorsee has not specifically instructed to send the bill through the post-office and the endorser sends it by post, the post office is presumed to be the agent of the endorser and the delivery is not complete unless the bill has reached the hands of the transferee.³ This is the view held by the Bombay High Court, but the Madras High Court in another case has argued that under the postal regulations a letter once posted cannot be taken back by the sender and therefore the post office is also the agent of the addressee and by merely putting the letter into the post-box it should be considered that there is sufficient delivery to the addressee.⁴

Delivery by

4. Delivery must be complete:—

The delivery should be of the complete instrument where the instrument is drawn in parts. All of them must be delivered. The endorsement should be for the whole of the amount of the bill. A delivery may be conditional or for a particular purpose only, but in such a case property in the instrument would not pass to the endorsee.⁵ At one time it was considered that a promissory note being an unconditional promise to pay, oral evidence about the condition precedent was barred by sec. 92 of the Evidence Act but it has now been held by the Allahabad High Court⁶ that such evidence can be adduced. For the purposes of negotiation the delivery must be unconditional. It is only when the bill becomes the absolute property of the transferee that negotiation is complete. In a conditional delivery this effect would take place only on the fulfilment of that condition.

Any person drawing, making, or endorsing a bill or his agent can make effectual delivery of the instru-

Persons entitled to make delivery

-
1. 11 Bom. 257.
 2. 25 Bom. L. R. 604.
 3. Jagjiwandas vs. The Nagar Central Bank 50. Bom. 118 : A. I. R. 1926 Bom. 262.
 4. 13 Mad. 242.
 5. Punjab National Bank vs. Cotton Factory A. I. R. 1924 Lah. 640.
 6. Bhogi Ram vs. Kishori Lal A. I. R. 1928 All. 289.

ment. The person must be legally capable of entering into a contract. Difficulty sometimes arises where the maker after writing the endorsement does not deliver the instrument at once but postpones it to some future date and, before the actual delivery takes place, he becomes insane or otherwise incapacitated. It is not necessary that delivery should be made simultaneously with the endorsement.¹ But delivery must be made by the person making the endorsement or somebody on his behalf. If a person dies after making an endorsement on an instrument payable to order, his legal representative cannot make delivery.² He must make a fresh endorsement. On the other hand, if delivery has taken place before his death and endorsement has not taken place the legal representative of the deceased may make a valid endorsement.³

The hundi can be negotiated in the manner specified above, and money can be raised by any number of successive parties by means of negotiation till the hundi reaches maturity when the final payment is made. The final payment of the hundi can be made only after the period mentioned in the hundi has passed and this is called the period of maturity. There are different rules at different places about the maturity of a hundi and the time when the drawee is required to make the payment. After negotiation we logically come to the next topic of the maturity of a hundi, namely the period upto which a hundi can be negotiated.

Maturity of a Hundi.

It is the date on which a hundi becomes payable. There are several usages according to which the maturity of a hundi is calculated.

Days of grace.

(1) Days of grace:—

As said above the hundi can be divided into *Darshani Hundi* (Bills payable on demand) and *Muddati Hundi* (Bills payable after a specified period).

Instruments payable on demand are not entitled to any days of grace. They become payable at once. Every bill payable at a specified period after date or after sight is entitled to days of grace. Days of grace are allowed to the acceptor to enable him to manage for the necessary

1. Bhays vs. Dara 19 Bom. 636; Kote Venkata vs. The official Receiver 33 Mad 196.

2. Sec. 57 of the Negotiable Instruments Act.

3. 1 Ch. 889. 1 to 32.

funds. No days of grace are allowed in France, Germany, Russia, Norway, Sweden, Denmark, Holland, Belgium and Italy. In Canada and England three days are allowed. In the United States the number of days varies. The Indian Negotiable Instruments Act allows 3 days.¹ Among Indian merchants the number of days varies. In Bombay the rule is as follows:—

- (1) No day of grace is allowed for hundis of 11 days period.
- (2) Three days for bills with a period between 11 and 20 days.
- (3) 5 days for bills with a period of over 20 days. In the case of Calcutta Hundi of over 20 days period, the days of grace are four only.

In U. P. the period of grace is fixed at 3 days. If a Hundi is drawn on May 7, payable after 61 days, the indorsee would not be liable to present it before 10th, of July.²

Interest is charged for the days of grace.

Days of grace, which were originally meant as concession to the acceptor, have now hardened into a "matter of right." So an important question arises as to whether the parties can contract that no days of grace would be allowed. The point was discussed in a Madras case, and it was held that the parties to a negotiable instrument could not dispense with the days of grace.³ In other cases,⁴ however, it was held that in the absence of any prohibition in the Negotiable Instruments Act, the sanctity of the contract must be respected and the parties can contract themselves out of the days of grace.

An instrument must be presented on the last day of the days of grace. Presentment before that date would be invalid.⁵

(2) Method of calculation of period.

Method of calculation.

(a) Where a hundi is payable after a number of months, after date or sight, the period shall be held to terminate on the day of the month which corresponds with

1. Sec. 22 of the Negotiable Instruments Act.

2. Ganga Prasad vs. Hira Lal 39 All. 86.

3. P. M. A. Valliappa chetty vs. Subramanian chetty 26 M. L. J. 494.

4. Suba Narain vs. Rama Swami Aiyar 30 Mad. 89 (F. B.) 23 I. C. 421; 28 Madras 244.

5. (1894) 2 Q. B. 759.

the day on which the instrument is dated or presented for acceptance.¹ Calculation is to be made according to the Gregorian calendar. Even where Indian date is given in the hundi this rule must be followed unless there is a usage to the contrary. Thus a hundi dated 29th, January matures on 28th, February. In Ludhiana and Jullundhar the period of hundi is generally fixed at 61 days called *Ikahat miti* Hundi, while in Amritsar it is 91 days for *Miadi Hundi*. The rule at other places varies.

(b) In calculating maturity of bills so many days after date or sight, the day of the date or of presentment for acceptance, shall be excluded.²

(c) Where the day of maturity is a holiday, the hundi matures on the next preceding day.³

(d) *Rahi miti and Gai miti or Gali miti.*

On the day when the bill matures the hundi is to be presented upto a particular time. For instance, to Marwari chamber of commerce at Bombay it should be presented upto 4-30 p.m. standard time. If the bill is presented before 4-30 P. M. it is called *Rahi Miti* and the payment should be made the same day till 12 P. M., but if the hundi is presented after 4-30 P. M. it is *Gai or Gali miti i.e.* (past time). It would be counted as the next subsequent day and payment can be made the next day. The time fixed varies at different places.

Presentment of a hundi.

Having dealt with the negotiation of a hundi it should now be seen how a hundi is presented. Presentment can be for three purposes:—

- (1) Presentment for acceptance. (Sec. 61).
- (2) Presentment for sight. (Sec. 62).
- (3) Presentment for payment. (Sec. 64)

These sections of the Negotiable Instruments Act run as follows:—

Sec. 61:—

“A bill of exchange payable after sight must, if no time or place is specified therein for presentment, be presented to the drawee thereof for acceptance, if he can after reasonable search, be found, by a person entitled to demand acceptance, within a reasonable time after it is drawn, and in business hours on a

1. Sec. 23 of the Negotiable Instruments Act.
 2. Sec. 24 of the Negotiable Instruments Act.
 3. Sec. 25 of the Negotiable Instruments Act.

business day. In default of such presentment no party thereto is liable thereon to the person making such default.

If the drawee cannot, after reasonable search, be found, the bill is dishonoured.

If the bill is directed to be presented to the drawee at a particular place, it must be presented at that place; and, if at the due date for presentment he cannot, after reasonable search, be found there, the bill is dishonoured.

Sec. 62:—

A promissory note, payable at a certain period after sight, must be presented to the maker thereof for sight (if he can, after reasonable search, be found) by a person entitled to demand payment, within a reasonable time after it is made and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default.

Sec. 64:—

Promissory notes, bills of exchange, and cheques must be presented for payment to the maker, acceptor, or drawee thereof, respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties thereto are not liable thereon to such holder.

Where authorized by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.

Exception:—Where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof.

These rules apply to hundis also.¹ Bills payable after sight and bills, in which there is an express stipulation that they shall be presented for acceptance before they are presented for payment, must be so presented.² In the case of other bills it is optional for the holder to present for acceptance, but by presenting the bill for acceptance the holder gets immediate right of recourse to prior parties in case of non-acceptance.³

Presentment is the showing of the bill to the drawee, who after examining the bill may decide for himself whether to accept it or not. Mere notice of the existence of the bill in possession is not enough. The bill must actually be presented and the drawee can insist upon it

Method of
presentmen

The method of the presentation of a 'shah jog' hundi has been described in Daulat Ram's case⁴ in the following words:—

1. Shan Mugam vs. Chinna Swami 14 Mad. 470, 10 Bom. 246.

2. 2 Moo. R. 117 (R. vs. Kinneer), The Bills of Exchange Act Sec. 39.

3. 9 Moo. P. C. 46; 1919 M. W. N. 780.

4. Daulatram Shriram vs. Bulakidas Khemchand (1869) 6 Bom. H. C. R. 24.

"The general process is this:—The shah or person who has bought or holds the hundi, and whose name must always be indorsed on it before it is presented, sends one of his men to the shop of the drawee, whose *killidar*, after referring to the particulars of advices relating to the hundi which have in due course been previously entered in the *chitti nondh* or bill-book, and finding it correspond therewith, thereupon, enters in the journal the particulars of the hundi, viz, its amount, date, due date, name of shah or person tendering it for acceptance, and whose name, as already intimated, is always indorsed on the hundi. He then returns the hundi to the servant of the shah, who takes it back to the shah's shop. If the day of presentment be the exact due date, the amount is paid on that very day; if the hundi is overdue when presented, it is generally paid the next day, the reason assigned being that, unless presented on the actual due date—when of course its presentation is expected and provided for—the *munim* or principal of the firm may not be present, or there may not be sufficient cash in the hands of the *killidar* to meet the amount. Payment is made by sending the amount by a servant of the drawee to the shop of the shah. On receiving the amount, the *killidar* of the shah writes an acknowledgment in full on the back of the hundi and sends it back to the shop of the drawee by the servant who has brought it thence".

Who can present

It is the holder of an instrument or his agent who can make presentment for payment. The person making the presentment should be able to receive payment and to give a valid discharge to a bill. Therefore not only the holder but a person to whom an endorsement has been made for collection can present the bill for payment.¹

To whom presentment should be made.

Presentment should be made to the following persons:—

1. To the drawee or his duly authorized agent.
2. To all the drawees if there are more than one.
3. To the drawee in case of need. Non-presentment to him absolves the drawer from responsibility.²
4. To the legal representative of a drawee if he be dead.
5. To the official assignee of the drawee if he be insolvent.

Presentment to these persons is provided by secs. 75 and 115 of the Negotiable Instruments Act.

The next important thing to be considered about presentment is the time and place of presentment. Among Indian merchants the holder of a hundi is called *Lchni-wala* and endorsement is called *Bechan*. Presentment is

1. Subramanian chetty vs. Alagappa chetty 30 Mad. 441.
2. Bahadar Chand vs. Gulab Rai A. I. R. 1929 Lah. 579.

called *Dekhar* and *Naqal*. According to the Marwari Chamber of Commerce, Bombay, which more or less represents the body the usages of which are followed in the up-country, has laid down in clause 2 (d) of its byelaws of 1929 that the holder must present the hundi to drawee not only for inspection (*Dekhar*) but also for taking the copy of the hundi in his books.

Section 65 of the Negotiable Instruments Act provides that presentment for payment should be made during the usual hours of business, and section 66 lays down that bills payable after date or sight must be presented for payment at maturity. These are merely general rules for guidance. In the case of a hundi presentment is made according to local usage.¹ Presentment should be made within a reasonable time.² What is reasonable time is a mixed question of fact and law.³ It depends upon the facts of each case. Thus a hundi drawn in Calcutta on a firm at Jaipur was presented 25 days after its arrival⁴ and a hundi drawn at Gojra on a firm at Karachi was presented after 11 days⁵ and in both the cases presentment was held to be within time. In Bombay, hundi coming from abroad must be presented at least one day after its receipt but before the due date⁶ (*pakti miti*). In Bombay the prescribed hours of presentment are from 10 A.M. to 5 P.M. on the due date. If the presentment is made within these hours it is valid. If, however, the hundi is presented after 5 P.M. but before 6-30 P.M., the drawee must record his acceptance on it and take notes thereof, but in view of the fact that the hundi was presented in *Gali miti* (after 5 P.M.) the drawee can make payment the next day and without interest for that day.⁷

Time of presentment.

After a hundi has been presented and its copy has been taken by the drawee, it is called *Khari hundi* upto the time of its payment. At some places there is a custom that the holder should keep the hundi pending for a few days after *Dekhar* (inspection). In Bombay the period prescribed is 3 days and at Hapur it is 4 days. The drawee, however,

Khari hundi

1. Imperial Bank of Orrissa vs. Fatte Chand 21 Bom. 294.

2. Firm Harnam Singh vs. Firm Nikka Ram A. I. R. 1938 Lahore 183.

3. Bahadur Chand vs. Gulab Rai A. I. R. 1929 Lah. 577.

4. Muthy Lal vs. Chhogimul 11 Cal. 342.

5. Mehta Bahadur Chand vs. Gulab Rai 11 Lah. 34: A. I. R. 1929 Lah. 577.

6. Clause 3 (a) of the Byelaws of Marwari Chamber of Commerce Bombay of the year 1929.

7. Clause 19 *ibid*.

has to pay interest for these days.

Place of present-
ment.

According to section 68 of the Negotiable Instruments Act presentment should be made at the place specified in the bill. Where there are two or more places mentioned, presentment may be made at any one of them.¹ If no place is mentioned in the bill of exchange, section 70 provides that it must be presented for payment at the place of business or at the usual residence of the maker, drawee or acceptor as the case may be. If the maker, drawee or acceptor has no known place of business or fixed residence and no place is specified in the bill for presentment, acceptance or payment, such presentment may be made wherever he can be found.² The holder must use due diligence in finding out the place of business or residence of the maker, drawee or acceptor and if no such place is found then only can a personal presentation be made.³

When present-
ment can be
excused.

A bill may be treated as dishonoured by non-acceptance without presentment in the following cases:—

(a) When the drawee is a fictitious person or incapable of contracting (sec. 91).

(b) When drawee cannot be found after reasonable search. (sec. 61)

(c) When the presentment cannot be made due to a cause beyond the control of the holder. (Sec. 75a)

(d) Where a hundi is lost and the drawer on demand refuses to supply with the duplicate.⁴

When present-
ment unnece-
ssary.

According to sec. 76 of the Negotiable Instruments Act no presentment for payment is necessary and the instrument is dishonoured at the due date for presentment in the following cases:—

(a) If the maker, drawee or the acceptor intentionally prevents the presentment of the instrument. An example of this is to be found where the party gets hold of the bill and keeps it till after maturity, or where the hundi is lost and the drawer refuses to give the duplicate.

(b) Where the instrument is payable at the place of business but the business place is closed during business hours.

1. *M. C. Chiggan Mal Sowar vs. Desur Manicka* A. I. R. 1926 Mad. 792: 50 M. L. J. 242.

2. Sec. 71 of the Negotiable Instruments Act.

3. *Udho Ram vs. Hemraj* A. I. R. 1924 Lah. 198.

4. A. I. R. 1924 Lah. 198.

(c) Where the instrument is payable at some other specified place but no person authorized to make payment attends such place.¹

(d) If the payee cannot be found after reasonable search.

(e) Where the payee expressly waives his right.

(f) Where a part payment is made on account of the amount of the bill, no subsequent presentment is necessary.

(g) No presentment is necessary against the drawer, if the drawer could not suffer damage for want of presentment. It must be strictly proved by the person suing on the hundi that the drawer could not possibly have suffered damage.² This may happen where the drawee and the drawer are the same,³ or when there is no fund of the drawer in the hand of the drawee unless the bill has been accepted to accommodate the drawer,⁴ or where the drawee is fictitious or incompetent to contract.⁵ Even when the acceptor himself informs the holder before maturity that he would make no payment even then the bill must be presented.⁶

(h) When drawer and the drawee are the same, the holder may treat the bill as payable on demand and no presentment is necessary.⁷

(i) When the drawee is a fictitious person, no presentment is necessary. The presentment cannot be made in as much as the drawee does not in reality exist.

(j) If the drawee be a person incompetent to contract, presentment must be made against the endorsers. No presentment is necessary as against the drawer, for he committed fraud by drawing the bill upon a person who is incompetent to pay.

(k) If the drawee is dead the holder has the option, according to sec. 74 of the Negotiable Instruments Act, to

1. 1 Lah. 262.

2. Bhikki Mal vs. Raghubir Singh A. I. R. 1925 All. 811; 47 All. 572; 57 I. C. 304.

3. Shanker Das vs. Firm Ditto Ram A. I. R. 1927 Lah. 72; 7 Lah. 113; Firm Buddhu Mal vs. Gokal Chand A. I. R. 1926 Lah. 328; 44 All 654.

4. 2 Bom. L. R. 891, Gaindalal vs. Balkishan A. I. R. 1922 All. 422.

5. 39 All. 364, 41 All. 40, 80 I. C. 557.

6. Baker vs. Birch 3 Camp. 107.

7. Lachhman Pd. vs. Ram Chandra 51 I. C. 859; Pachkori vs. Mulchand 44 All. 554; Jhandu Lal vs. Wilaiti 47 All. 572; Budha Mal vs. Gokul Chand 7 Lah. 113; Shanker Das vs. Ditturam 8 Lah. L. J. 604.

present the bill to the legal representatives of the deceased or not. Under sec. 76 death is not an excuse for non-presentment and therefore as a prudent measure presentment should be made for payment to the legal representative.

(l) Presentment is excused when it is impossible to do so *e.g.* breaking out of war, political disorders, prevalence of malignant epidemics etc. There are also special circumstances in which presentment can be excused, for instance, sudden and severe illness, closing up of the means of communication and delay in post for which the person held liable to present should not be held responsible.

(m) Non-presentment can be no excuse against the transferor when the holder gets the bill so late that presentment is impossible.

(n) Where the drawer or indorser undertakes to meet the demand of the holder, no presentment is necessary.

In order to charge the parties it is absolutely essential to present the hundi at its maturity.¹ This rule, however, does not apply to makers or acceptors who are the principal debtors and are bound to pay the holder whether presentment is made or not.² It has repeatedly been held that even if the hundi is not presented on due date the acceptor remains liable.³ For the other party to the hundi the proof of presentment for payment is absolutely essential. Even the death or insolvency of the maker, drawee, or acceptor or loss of the bill would not constitute a valid excuse.⁴ Where no presentment has been made all parties except the drawer and the acceptor shall be discharged. The holder cannot even fall back and sue them on the principal consideration.⁵ This rule applies where the hundi is the principal consideration but not where it is given merely as a collateral security to pay up some other debt.

Ordinarily presentment is made twice, once for acceptance and a second time for payment. Therefore the next stage in the process of negotiation after the first presentment is the acceptance: and so the nature of acceptance should be examined now. It has previously been remarked that the three initial parties to the hundi are the drawer,

1. 59 I. C. 606.

2. *Ghanlal vs. Karamchand* A. I. R. 1929 Lah. 240; 10 Lah. 775; A.I.R. 1930 All. 648; 19 I. C. 251, 32 Bom. 247; 25 Mad. 580; 21 All. 450.

3. 52 All. 626; *Devidatta Mal vs. Partap Singh* A. I. R. 1933 Lah. 176; 10 Lah. 775; 32 Bom. 247 but see 59 I. C. 624 contra.

4. *Udho Ram vs. Hem Raj* A. I. R. 1924 Lah. 198, 72 I. C. 777.

5. *Sagar Mall vs. Bhudan Sahee* 19 I. C. 251.

the drawee and the payee. It is the drawee who becomes an acceptor after presentment has been made to him and he has accepted the hundi. After acceptance the acceptor becomes the principal debtor and the drawer merely assumes the position of a surety.

Acceptance.

The word acceptance has nowhere been defined in the Indian Negotiable Instruments Act. It is defined in the English Bills of Exchange Act sec. 8 clause 3 as "The signification by the drawee of his assent to the order of a drawer."

What is acceptance.

1. It must be in writing. No particular words are required for acceptance. All that is needed is that the words must show the acceptor's assent to the payment of the bill. In the case of hundis, even oral acceptance is good if it is upheld by local custom.¹

Essentials of a valid acceptance.

2. It must be signed. Even if the drawee merely writes "accepted" on the face of the bill, and signs it, it is a valid acceptance.

3. It must be on the face of the bill. In the case of a hundi, acceptance is usually written on its back.² An acceptance, written on the copy of a hundi, which is not a part of it, or on a separate paper, has been held to be invalid.³

4. The acceptance can only be completed by the delivery of the instrument to the acceptor; until the bill has been delivered, the acceptor can change his mind and cancel the acceptance.⁴

The holder of a bill is entitled to a complete and unqualified acceptance of the bill, and unless it is so made, the holder may treat the bill as dishonoured. Acceptance may also be of several kinds namely, (1) conditional, (2) qualified and (3) partial.

Kinds of acceptance.

Conditional acceptance is one in which the acceptor undertakes to pay the money upon the happening of a certain event. The holder has an option either to accept it or to reject it. In either case, he must give notice of the fact. In the case of a conditional acceptance, the con-

Conditional acceptance.

1. Panna Lal vs. Hargobind 51 I. C. 250 : 1 Lah. 80; Dwarka Das vs. Lachhmi Narain A. I. R. 1924 All. 129; A. I. R. 1930 Lah. 471.

2. Ardeshir Sorabsha Moss vs. Khushaldas Gokal Das 32 Bom. 247.

3. Gurudas vs. Khemchand 13 Lah. 31; 32 Bom. 247.

4. Cox vs. Troy (1822) 15 Bom. & Ald. 474; Van Dieman's Land Bank vs. Victoria Bank (1871) L. R. 3 C. P. 526. See Bentinck vs. Dorrin (1805) 6 East. 199.

dition should appear in the written acceptance itself. No oral condition can be proved to qualify a clear acceptance of the instrument.¹ If the holder agrees to a conditional acceptance, he cannot bind the prior parties to the bill, unless they also agree to be bound by the conditional acceptance. In the case of a bill, the drawer adopts a certain tenor to the contract. The drawee, by making a conditional acceptance, and the holder, by accepting it varies the contract. It is a fixed principle of law that the drawer or the other prior parties cannot be bound unless they adopt the varied contract as their own.

Such an acceptance can be subject to three kinds of qualifications namely qualification (a) as to time (b) as to place and (c) as to parties.

This qualification comes in when the drawee fixes a time different from that given in the bill by the drawer. This qualification modifies the contract between the drawer and the endorser, and will discharge such parties unless they also agree to the modified contract.²

The qualification as to place comes in when a particular place for payment is given in the bill but the acceptor makes it payable elsewhere. Where no place is specified in the bill, but the acceptor makes it payable at a particular place, it will not be a qualified acceptance, but will be treated as a general acceptance.³

Where a bill is drawn on two or more drawees but only one or some of them accepts it, it will be a qualified acceptance. As a general rule, all the drawees must accept the bill and if the bill is not accepted by any one of them, it must be deemed to be dishonoured. If, however, the drawees are partners, acceptance by even one of them may be sufficient, on the principle that each partner is the agent of the others.

These are the principal qualifications which may be attached to an acceptance, but the list is not exhaustive. There might be other qualifications according to the circumstances of the case.

A partial acceptance is one by which the drawee undertakes to pay only a part of the sum provided in the bill. Under the English law, if the drawee undertakes to pay a part of the consideration, or a part of the consideration in cash, and the rest in goods, or in bills, it is a valid

1. Hoare vs. Graham, (1811) 3 Camp. 56.
2. Paton vs. Winter (1809) 1 Taunt. 420.
3. The Bills of Exchange Act, sec. 19 (c).

Qualified
acceptance.

Qualification as
to time.

Qualification as
to place.

Qualification as
to parties.

Partial accep-
tance.

acceptance.¹ Under the Indian law, however, no partial acceptance is permissible. If the holder consents to such a partial acceptance, it will discharge all prior parties not agreeing to it.

Acceptance can be made by the following persons:— Who can accept

1. By the drawees of the bill.
2. By the agent of the drawee.
3. By one of the several drawees, if they are partners.
4. Drawee in case of need. A stranger cannot be an acceptor except when he is an acceptor for honour.²

The following are the essentials of an acceptance for honour:—

1. It must be made after noting and protest.
2. It must be with the consent of the holder.
3. It can be given only by a person not already liable under the bill.
4. It must be before the bill is overdue.
5. It must be in writing, on the bill, and unqualified

Essentials of an acceptance for honour.

An acceptance for honour may be made after the bill has been dishonoured by the drawee. Similarly, acceptance can be made even if the endorsement is forged, or drawer's name is forged, or it is drawn in a fictitious name.

Forged endorsement.

Under sec. 41, if the endorsement of the bill be forged at the time of the acceptance, the acceptor, who accepts the bill having knowledge of the forgery, cannot afterwards be heard to say that the endorsement was not genuine. The acceptor is liable in such a case, even if the endorsement be forged.

Drawer's name forged.

There is no specific provision about such a contingency in the Negotiable Instruments Act. Ordinarily, an acceptor can relieve himself of liability by showing that the drawer's name is forged, but if the acceptance is with the knowledge of such a forgery the acceptor would be liable within the spirit of sec. 41.

Bills drawn in a fictitious name.

According to sec. 42 an acceptor of a bill of exchange, drawn in a fictitious name, is not relieved of his liability to any 'holder in due course' claiming under an endorsement by the same hand as the drawer's and purporting to be made by the drawer.

1. The Bills of Exchange Act sec. 44 (2); *Wegerseloffe vs. Keene*, (1719) 1 Stra. 214; Cf. *Rowe vs. Younge*, (1820) 2 Bligh. 409.

2. *Jagan Nath vs. Heap & Co.* 71 P. R. 1909; 2 I. C. 804.

The meaning of the word 'fictitious' has given rise to a lot of controversy in England. The result of all the decided cases is that wherever the name of a person is inserted as a payee without any intention that payment should be made to him, the payee is fictitious, it being immaterial whether that person exists or not.¹ Therefore, the payee may be fictitious, though there might exist a person of that name. The English case was about a payee, but the meaning of the word "fictitious" is applicable to the drawer as well.

Where the name of the drawer is fictitious under sec. 117 of the Evidence Act, the acceptor can show that the bill was drawn by somebody else than that named in the bill, but he cannot deny that there exists a drawer. By accepting the bill, he impliedly acknowledges that he has the funds of the drawer in his hands and, therefore, he is estopped from denying the existence of the drawer altogether. Following the spirit of sec. 42 it would appear that the acceptor is liable to the 'holder in due course', even if the drawer is fictitious.

There may be cases in which the payee is fictitious. Under the English Bills of Exchange Act, the acceptor is not relieved of liability if the payee is fictitious. It is immaterial whether the fact is within the knowledge of the acceptor or not. The Indian Act is silent on this point. However, according to sec. 41, if the acceptor knows that the character of the payee is fictitious, he is liable to the third party. If he does not know, even then he should be held liable for the reasons given by Daniel, namely, (1) that the acceptor having funds of the drawer in his hands may be made liable, just as a drawer can be, by a holder deriving title through a fictitious payee; (2) it is no concern of the acceptor whether the payee is fictitious or not. He, holding the funds of the drawer, is bound to pay the holder in accordance with the directions of the drawer, no matter whether the payee is fictitious or not. It is only where the payee's endorsement is forged, that the drawee would be liable to the real payee.

Failure of consideration.

In this connection it is also necessary to consider the liabilities of the parties for want of total or partial consideration of the bill.

Every contract must have a consideration. The parties to the contract are always at liberty to plead want

1. Robinson vs. Midland Bank (1925) 41 T. L. R. 402.

of consideration to avoid the contract. Negotiable Instruments, however, differ in two important respects from an ordinary contract:—

1. In an ordinary contract, it is the plaintiff who has to prove the consideration, but for a negotiable instrument, consideration is presumed under sec. 180 clause (a) and the party who pleads want of consideration must prove it.

2. According to sec. 43, the effect of want of consideration is as follows:—

“A negotiable instrument made, drawn, accepted, indorsed, or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But, if any such party has transferred the instrument with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

Exception I. No party for whose accommodation a negotiable instrument has been made, drawn, accepted, or indorsed, can, if he has paid the amount thereof, recover thereon such amount from any person who became a party to such instrument for his accommodation.

Exception II. No party to the instrument who has induced any other party to make, draw, accept, indorse, or transfer the same to him, for a consideration which he has failed to pay or perform in full, shall recover thereon an amount exceeding the value of the consideration (if any) which he has actually paid or performed.”

Thus the want of consideration can be pleaded between the immediate parties to a bill of exchange, but not so as against remote parties, for the instrument is meant to circulate from hand to hand. Once a holder for consideration intervenes, the instrument cannot be said to be without consideration. By the words ‘immediate parties,’ are meant drawer and the acceptor, drawer and the payee, and the endorser and the endorsee. Thus, where one person makes a gift of a bill to another, the donee cannot sue the donor on the bill. An endorser, who puts his name on the bill as the agent of the endorsee for the safe custody of the bill, is not liable.¹

The remote parties to an instrument are the payee and the acceptor, endorsee and acceptor and endorser and remote endorsee.

The following are the qualifications to the rule laid down in sec. 43:—

1. (1856) 10 Moo. P. L. 94.

1. A person who accepts a bill with knowledge of the want of consideration, is not protected.¹

2. It is the want of consideration of the bill which would make it invalid. Inadequacy of consideration has no effect. Illegality of the consideration has the same effect as the absence of consideration. However, a person who holds a bill of exchange for collection, is a holder of the bill for consideration.²

3. Where there are joint promisors of a bill and the consideration has passed from only some of them it is valid.

4. No party to an instrument who has induced another to make, accept, endorse, or transfer the same to him for consideration, which he fails to pay in full, can recover thereon an amount exceeding the consideration which he has actually paid.³

5. In the case of accommodation bills, the accommodating party lends his name only for the purpose of obliging a friend. If the party accommodated makes the payment, he cannot sue the accommodating party.⁴ If, however, the bill is transferred to a third party, the parties accommodating and accommodated are both liable to that third party.⁵

Partial failure
of consideration.

The effect of partial failure of consideration is laid down in sec. 44:—

Sec. 44:—

“When the consideration for which a person signed a promissory note, bill of exchange or cheque, consisted of money, and was originally absent in part or has subsequently failed in part the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced.”

According to this rule the amount which a holder, standing in immediate relation, can claim is proportionately reduced.⁶ If a part of the consideration of the bill is illegal, the principle of partial failure of consideration does not apply, for the entire instrument becomes void.

Sec. 44 deals with consideration which is cash.

1. 10 M. L. T. 79.

2. Royal Bank of Scotland vs. Rahim Cassim and sons, 27 Bom. L. R. 506.

3. 57 Indian Appeals page 1.

4. Nand Ram vs. Sitla Prasad 5 Allahabad 484.

5. 7 All. 490, 99 I. C. 753.

6. Nasir Ali vs. Kher Chand 36 I. C. 996; Kishan Bahadur vs. Sassa Ram A. I. R. 1924 Pat. 521; (1851) 11 C. B. 48.

The consideration may also be otherwise than cash and sec. 45 deals with such cases.

Sec. 45:—

“Where a part of the consideration for which a person signed a promissory note, bill of exchange or cheque, though not consisting of money is ascertainable in money without collateral inquiry, and there has been a failure of that part the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced.”

A hundi was drawn for £ 100/- as the price of two bales of cotton, each bale being worth £ 50/-. Only one bale was supplied, or the vendee returned the other bale being of inferior quality. The hundi could be sued upon only to the extent of half the consideration.¹

A agreed to supply goods worth £100/- to B. A supplied the goods and sent a bill for £100/- to B. B accepted the goods as well as the bill. The goods turned out to be of inferior quality and were worth only £80/-. It was held that the vendee could not set up the plea that the goods were worth only £80/-.²

Hundis were given for the lease of a fruit garden. The lessor did not attend to the garden in accordance with the terms of the contract, and thereby the garden was damaged. The lessee sued on the hundi and the lessor raised the plea of partial consideration. It was held that the lessor could not avail himself of that plea.³

A car was taken on hire purchase system for three years for Rs. 3,000/- to be paid in instalments and in part consideration a hundi for Rs. 1,000/- was given in advance. The owner took possession of the car before there was any default in the payment of the instalments. Suit was filed on the basis of the hundi. It was held that the amount of hire chargeable being only a matter of arithmetical calculation, part consideration of the hundi could be determined.⁴

After acceptance the next stage is the payment and the discharge of the hundi.

Discharge of a hundi.

Discharge may be effected by any one of the following means:—

(a) By payment (b) By cancellation (c) by release

1. *Agra and Masterman Bank vs. Leighton* (1866) L. R. 2 Ex. 56, 64, 66; *Arunachalam Chettiar vs. Krishna Aiyar* 49 M. L. J. 530.

2. *Glennie vs. Imri* (1839) 3 Y & C 436.

3. *N. T. R. Sethna vs. Lodak Khaku* 8 I. C. 924.

4. *Commercial Credit vs. Mohammad Idris* A. I. R. 1933 Lah. 470.

or (d) by operation of law. The first three methods are provided by sec. 82 which runs as follows:—

Sec. 82:—

“The maker, acceptor, or indorser, respectively, of a negotiable instrument is discharged from liability thereon,

(a) to a holder thereof who cancels such acceptor's or indorser's name with intent to discharge him, and to all parties claiming under such holder;

(b) to a holder thereof who otherwise discharges such maker, acceptor, or indorser and to all parties deriving title under such holder after notice of such discharge;

(c) to all parties thereto, if the instrument is payable to bearer, or has been indorsed in blank, and such maker, acceptor, or indorser, makes payment in due course of the amount due thereon.”

Payment of a hundi.

How payment
should be made.

Payment must be made in cash, currency, or any other medium or by bill, note, or cheque. The holder of a bill is not bound to accept payment except in coin, currency notes or recognised legal tender; but he may choose to accept in any other form. The parties may agree to set off one debt against the other.¹ Payment may be accepted by taking another bill in satisfaction of the old one.² Where the payee directed that the payer should withhold immediate payment, but must keep the amount of the bill in trust for his children, it was held to be good payment.³ Goods or other forms of payment when accepted by the holder discharge the obligation.

Payment is complete as soon as money is handed over to the holder. Payment should be made on the maturity of the bill. If it is made earlier and the bill is transferred to a third party for consideration the payer will be liable to pay for the hundi till it was overdue. By way of precaution, therefore, the bill should be taken back at the time of payment.

By whom pay-
ment is to be
made.

Payment can be made by the following persons:—

1. By the maker.
2. By the acceptor or his agent.
3. By the endorser.
4. By the party accommodated.
5. By a stranger. If a stranger makes payment,

3. Cuffs vs. Davis (1843) 12 M & W 159.

4. Periannan Chetty vs. Kudupooddy Mallaya 51 I. C. 577.

5. Abdul Hakim vs. Ebrahim Sulaiman 33 Cal. L. J. 132.

he would be regarded as a mere purchaser of the bill.¹ The payment by a stranger must be with the authority of the debtor.² The assent of the debtor may also be presumed.³ In a certain case a person paid the amount in due course without the consent of the drawer. The question arose whether such a person could be regarded as a surety. It was held that he can simply be regarded as a holder for value who has no higher rights than an ordinary holder.⁴

PERSONS TO WHOM PAYMENT SHOULD BE MADE.

1. According to sec. 78 payment should be made to a holder or his agent. Where a bank was holding a bill for collection, it was a 'holder in due course' and the payment made to the original endorser could not discharge the liability of the acceptor.⁵

To whom payment is to be made.

2. Payment should not be made to a beneficiary. The rights of a beneficiary to receive payment or to sue have been pointed out before.

3. To one of the partners. Where there are two or more holders of a bill who are partners, payment to any one of them would be a good discharge, as each partner is the agent of the other.

4. Where there are two or more joint holders who are not partners, it would appear according to Sec. 78 of the Negotiable Instruments Act, that payment to one of them will not be sufficient to give discharge, but the Madras High Court has held that payment to one of the joint creditors extinguishes the liability of the debtor completely.⁶ This view has been based on the last paragraph of sec. 38 of the Contract Act and upon the English case law.

5. Where the joint creditors are members of a joint Hindu family, the manager can give a valid discharge to the debt.⁷

Rights of the payer are given in sec. 81 of the Negotiable Instruments Act which runs as follows:—

Rights of the payer.

"Any person liable to pay, and called upon by the holder thereof to pay, the amount due on a promissory note, bill of exchange or cheque is before payment entitled to have it shown, and is on payment entitled to have it delivered up, to him, or, if the

1. Simpson vs. Eggington, (1855) 10 Ex. 845 : 24 L. J. Ex. 312.
2. Kemp vs. Balls (1854) 10 Ex. 607.
3. Cook vs. Lister (1863) 32 L. J. C. P. 121, 127.
4. Muthu Raman Chetty vs. Chinna Vellayan Chetty 30 M. L. J. 369.
5. Royal Bank of Scotland vs. Rahim 49 Bom. 270.
6. Barber Maran vs. Ramana Goundan 20 Mad. 461; Annapurnamma vs. Akkayya, 36 Mad. 544 (F. B.); Peri Ramasami vs. Chandra Kottayya, 47 M. L. J. 840. See Srinivas Das vs. Mehar Bai, 41 Bom. 300 (P. C.).
7. Valiet Das vs. Bunarussee Roy (1864) W. R. 262.

instrument is lost or cannot be produced, to be indemnified against any further claim thereon against him."

Thus it would appear that the rights of the payer are threefold: first, to see the instrument before payment; secondly, to get back the instrument on payment and thirdly, to get a guarantee of indemnity in the case of a lost bill. The possession of the instrument is *prima facie* evidence that the possessor is the holder of the instrument.¹ If a suit is filed on a lost negotiable instrument under Order 7 Rule 16 of the Civil Procedure Code, relief can only be granted upon indemnity being given by the plaintiff to the satisfaction of the court. Where a person has only a half of the note, the other half being lost, a suit may be filed on the half in his possession, and the bank may even make payment on the production of a half note without any indemnity, as the person taking the other half would do so with notice.²

Cancellation of
the instrument.

The second method of discharge is cancellation. A bill is discharged when all rights of action thereon are extinguished, and it cannot be negotiated further. Discharge of the bill itself must be distinguished from the discharge of one or more parties. The holder of a bill, or his agent, can cancel the name of any party on the instrument to give him discharge. In such a case that party is discharged from liability to the holder. If the person discharged be the principal debtor his sureties are automatically discharged.

A cancellation in order to be effective must be:—

1. INTENTIONAL.

The cancellation should be made with the intention of discharging the party. If it is done by mistake or without the authority of the holder, it will be in-operative.³ Where a bill or any signatures on a bill has or have been cancelled, the burden of proof lies on the person who alleges that the cancellation was by mistake or without authority.⁴ It is always safe for the holder to put down that the cancellation was made by mistake.

2. APPARENT.

The cancellation should clearly appear on the face of the instrument itself, for instance, by drawing a line across the name.

1. Muthar Sahib Maraikar vs. Kadir Sahib Maraikar 28 Mad. 544.

2. Kotivenkataramiah vs. Official Assignee of Madras 33 Mad. 196.

3. Bank of Scotland vs. Dominion Bank (1891) A. C. 592; Prince vs. Oriental Bank Corporation (1878) 3 A. C. 325 (P. C.)

4. The Bills of Exchange Act Sec. 63 (3).

The third mode of discharge is by way of release.

Release may be unilateral or by agreement of the parties. It has the same effect as cancellation. Under the ordinary law of contract, release may be given for a part of the contract only but in the case of negotiable instruments, if the holder accepts part payment, the entire bill is discharged, unless the holder makes a specific contract of reservation in his favour. Release of one of the joint parties will not release the others. A note may, however, be accepted in discharge of the old note.¹ For this it should clearly be proved that the parties intended to merge the old contract into the new one.² In India, a release by one or more joint holders operates as a discharge of the persons, who are released even as against the other holders,³ but the release of one or two or more joint acceptors, makers, or indorsers does not discharge the others.⁴ An agreement not to sue for some time,⁵ or to extend time for payment, does not discharge the principal debtor,⁶ although it may discharge the sureties. It has been held in England, that a covenant not to sue for a limited time does not suspend the right of action, and a holder or payee can sue in spite of such agreement.⁷ The reason is that the right of action once suspended by the act of the parties is gone for ever. Therefore, to allow such a contract to be pleaded as a bar to a suit would result in the release of the defendant altogether. These rules are based on the special features of the English common law. In India, the Madras High Court, following the English decisions, has held that such an agreement cannot be pleaded as a bar to a right of suit.⁸ These cases were considered by a Full Bench of the same High Court, and it was held that a covenant not to sue for a limited time may be

Release

1. 51 I. C. 577; 33 Cal. 842.

2. *Rahmat Ali vs. Dewa Singh* 4 Lah. 151; *Sengoda vs. Rasa Goundan* 36 Mad. 151; 19 I. C. 848; 25 Mad. 580; 30 Bom. 27; A. I. R. 1927 All. 236; 49 All. 257.

3. *Barbar Maran vs. Ramana Goundan* 20 Mad. 461; *Annapurnama vs. Akayya* 36 Mad. 544 (F. B.); *Peri Ramasami vs. Chandra Kottayya* 47 M. L. J. 840; *Nicholson vs. Revill* (1836) 4 A & E 675.

4. The Indian Contract Act. Sec. 44. Cf. *Moolchand vs. Alwar Chetty* 39 Mad. 548; *Krishan Chandra vs. Sanat Kumar* 40 Cal. 162.

5. *Annamalai Chetty vs. Velayudha Nadar* 39 Mad. 129.

6. *Cox & Co. vs. Pestonji & Co.* 28 Bom. L. R. 1264.

7. *Thimbleby vs. Barron* (1838) 3 M & W 210, 216; *Salmon vs. Webb.* (1852) 3 H. L. R. 510.

8. *Simon vs. Hakim Mahmed Sheriff* 19 Mad. 368; *Somasundaram Chettiar vs. Narasimhachariar* 29 Mad. 212.

pleaded as bar to an action brought in contravention of such a contract.¹

Discharge by
satisfaction.

Discharge is effected not only by the creditor accepting something in full satisfaction of the debt due under the bill, but also by the substitution of a new debt or a new security in satisfaction of the old one.²

Discharge by
operation of law.

The discharge by operation of law may take place in the following cases:—

(1) BY INSOLVENCY.

When the debtor becomes insolvent and the debts of the insolvent are discharged by the order of the Insolvency Court.

(2) BY MERGER.

If a judgment is obtained against the acceptor or indorser the debt is merged into the judgment debt, that is, merged into the decree. In England, if a new security is accepted for the old one the doctrine of merger is applied, but in India the doctrine of merger may or may not be applied according to the circumstances of the case.

(3) BY LAPSE OF TIME.

If a man allows his claim under the bill to be barred by limitation, the remedies open to him are extinguished, and the bill is discharged.

(4) DISCHARGE BY ALLOWING DRAWEE MORE THAN 48 HOURS TO ACCEPT.

If the holder of a bill allows the drawee more than 48 hours exclusive of holidays to consider whether he will accept the same, all parties, not consenting to such allowance, are thereby discharged from liability to such holder (sec. 83). After the expiry of 48 hours, it is the duty of the holder to call upon the drawee, and enquire whether the bill has been accepted or not. If the drawee does not signify his acceptance within 48 hours, the bill can be taken as dishonoured. This provision does not apply to all bills of exchange, or to hundis, but only to bills in which the acceptance by the drawee is obligatory, for instance, a bill of exchange after sight.³ It also does not apply where the hundi is presented not for acceptance but for payment.⁴

1. Annamalai Chetty vs. Velayuda Nadar 30 Mad. 129; see also Shaikh Imam vs. Ishak Ali 7 N. L. R. 39 : 10 I. C. 734.

2. Addison on Contracts 179; Periannan vs. Kudupooddy Mallayy 10 L. B. R. 4 : 51 I. C. 577.

3. Khan Chand vs. Golab Ram 39 P. R. 1911 : 10 I. C. 133; see Nandla vs. Firm Golab Bai 75 I. C. 610.

4. Tulshi Ram vs. Gur Dayal 50 L. J. 445; 48 I. C. 423; Ram Dayal vs. Lalta 47 I. C. 683.

(5) DISCHARGE BY QUALIFIED ACCEPTANCE.

If the holder takes a qualified acceptance, or one limited to part of the sum mentioned in the bill or a conditional acceptance, all parties not agreeing to such acceptance are discharged (sec. 86).

The nature of qualified, partial, and conditional acceptance has been discussed before.

(6) DISCHARGE BY MATERIAL ALTERATION OF THE INSTRUMENT.

The effect of material alteration is laid down in sec. 87 which runs thus:—

“Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration, and does not consent thereto, unless it was made in order to carry out the common intention of the original parties;

and any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof.”

This rule can be supported on two grounds.

1. The rule is essential to maintain the sanctity of contracts to prevent fraud by tampering with written securities,¹ and

2. To hold the parties to an instrument liable, it is essential that the bill should retain its identity as it passes from hand to hand. By alteration the identity of the instrument is lost, and it is highly unjust to hold a person bound by a contract to which he never agreed.²

This rule is applicable not only to alterations made by the holder but also to those made by strangers; for in either case the identity of the contract is lost.³ It is the duty of the person, who is in possession of the instrument, to preserve its integrity.

A material alteration is one, by which the character of the instrument is altered, and the contract, of which the instrument is the evidence, is affected thereby:⁴

What is a material alteration.

1. *Master vs. Miller* (1791) 4 T. R. 320; *Barumal vs. Dwarka Dass* 25 I. C. 667.

2. *Gogun Chandra Ghose vs. Dhuronidhur Mandal* 7 Cal. 616; *Atmaram vs. Umedram* 25 Bom. 616; *Gouchandra vs. Prasanna Kumar Chandra* 33 Cal. 812.

3. *Master vs. Miller* (1791) 4 T. R. 320; *Davidson vs. Cooper* (1844) 13 M & W 343; *Gogun Chandra Ghose vs. Dhuronidhar Mandal* 7 Cal. 616.

4. *Trapp vs. Spearman* (1800) 3 Esp. 57; *Aldous vs. Cornwell*, (1868) L. R. 3 Q. B. 573; *Lakshammal vs. Narasimha Raghava Iyengar*, 38 Mad. 746.

INSTANCES OF MATERIAL ALTERATION.

Alteration of date.

Alteration in date is a material alteration.¹ The reason is that date indicates the time when the contract was made, and in most cases fixes the period during which the contract is to be performed, and also enables the calculation of the period of limitation for a suit on the basis of the bill.² The second reason is that the alteration in date may postpone the time for payment,³ or may bring the date nearer. The third reason is that the party can very well object that it was not the contract which he entered into, for date is a material part of the instrument.⁴

Alteration in the time of payment.

Where a bill was payable three months after date, but it was converted into a bill payable three months after sight, it was held to be a material alteration.⁵

Alteration in the place of payment.

If an instrument is payable at a particular place, but a new place is inserted in it, or the place is scored out, so as to make it payable generally, it is a material alteration. It may also affect the jurisdiction of the court in which the suit is to be brought.⁶ Alteration in time and place may be made with the consent of the acceptor and the prior parties.

Alteration in the rate of interest.

If the bill contains no rate of interest, and the rate is interpolated,⁷ or the specified rate is altered,⁸ it would amount to material alteration.

Alteration in amount

If the amount of the bill is altered so as to make the bill payable for a larger or a smaller sum it would amount to alteration.⁹

Alteration in the medium of payment.

Although a change in the medium of currency does not ordinarily result in injury, yet owing to the fact that it might injure somebody or operate against his conve-

1. *Master vs. Miller* (1791) 4 T. R. 320; *Kader Nath vs. Garrad*, 1 Bur. L. J. 244; 77 I. C. 761.

2. *Govindasami vs. Kuppursami* 12 Mad. 239; *Namdev vs. Swadeshi Mandali Ltd.*, 28 Bom. L. R. 944; *Vyopari Atmaram vs. Umedram* 25 Bom. 616; 26 Bom. 91, 52 Bom. 584; 13 A. L. J. 683.

3. *Outwaite V. Luntley* (1815) 4 Camp. 179.

4. *Stephens vs. Graham* 7 Serg & R. 505 (Amer). see *Makhdam Bakhsh vs. Shawkat Ali* 13 A. L. J. 683.

5. *Long vs. Moore* (1790) 3 Esp. 155. notes.

6. *Lakshammam vs. Narasima Ragava Aiyengar* 38 Mad. 746; 3 Cal. 220.

7. *Sunder Khatik vs. Mahadeo* 23 A. L. J. 253.

8. *Sutton vs. Toomer* (1827) 7 B & C 416; *Christacharlu V. Karibassayya* 9 Mad. 399; *Sunder Khatik vs. Mahadeo* 23 A. L. J. 253; 12 Mad. 239; 12 Cal. 313; *Ram Singh vs. Gulab* 1 Lah. 262; 25 I. C. 667; 6 Bom. 371; 74 I. C. 320; N. R. 19 (1903) A. I. 49.

9. *Hamelin V. Bruck* (1846) 9 Q. B. 306; *Scholfield vs. Londesborough*, (1896) A. C. 514; *Imperial Bank of Canada vs. Bank of Hamilton* (1903) A. C. 49.

nience, it has been held to be a material alteration. A bill payable in rupees if altered as payable in pounds would amount to a material alteration.

Addition of new parties to a bill, without the consent of the parties, concerned would vitiate the instrument.¹ A promissory note ran as follows:—

Alteration of parties

“We the undersigned jointly and severally promise...” Adding of signatures below this would amount to addition of makers.² Two persons jointly executed a promissory note but it was found that the signatures of one of them were forged, the whole note became unenforceable.³ Similarly cutting off,⁴ or erasure of,⁵ the name of maker or makers, or an alteration in the name of the payee,⁶ was held to amount to material alteration. Similarly, change in the character of the party would also vitiate the bill.

Anything which tends to alter the words of negotiability of the instrument will amount to material alteration. The addition of the words “or order or bearer” was held to be a material alteration. Similarly, the change of the word ‘bearer’ into ‘order’ is a material alteration, but the substitution of ‘order’ for ‘bearer’ is not a material alteration.⁷

Alteration in the character of the bill.

If any material part of a bill is torn away with a view to conceal something or change the bill from what it originally was, it must amount to material alteration.

Tearing of a material part.

WHAT IS NOT A MATERIAL ALTERATION.

1. Alteration in a bill before it is complete or is issued by the drawer, does not amount to material alteration.⁸

What is not a material alteration.

2. Where a bill is altered in order to correct a mistake and to make it what it originally was intended to be, the bill would not be vitiated.⁹

3. If the bill is altered with the consent of the

1. Gardner vs. Walsh (1855) 5 E & B 83; Gourchandrar Das vs. Prasanna Kumarchandra 33 Cal. 812; Cf. Madan Pillai vs. Athirnarayana 21 L. W. 532.

2. Masein V. Chidambaram Chetty 4 Bur. L. T. 19: 9 I. C. 463.

3. Amirtham Pillai vs. Nanjah Gounden, 26 M. L. J. 257.

4. Mason V. Bradley (1843) 11 M & W 590.

5. Nicholson vs. Revill (1836) 4 A & E 675.

6. Kamal Khan vs. Nizamuddin 20 A. L. J. 987.

7. Atwood V. Griffin (1826) 2 C & P 368.

8. Webber V. Maddocks (1811) 3 Camp. 1; Wright V. Inshaw (1842) 1 D. N. S. 802.

9. London Provincial Bank vs. Roberts (1874) 22 W. R. 402; Gopal Row vs. Veervaikram 22 M. L. J. 121 (payee's name altered to correct a mistake); Brutt V. Picard (1824) Ry. & M 37.

parties, the instrument would not be rendered void.¹ If the effect of the alteration by consent be to defraud a third party, the contract would become illegal.²

4. If the alteration is immaterial, it will not affect the contract. There may be alterations to make explicit what was implied in the instrument. Such alterations cannot affect the validity of the bill.³ Where a bill payable to bearer is converted into one payable to order,⁴ or where the words "on demand" are added to a note in which no time is expressed,⁵ it was held that these were not material alterations. Similarly, if the rate of interest is specified in the bill the addition of the words "with interest" does not amount to material alteration.⁶ Also, addition of a mere statement of a fact which is not covered by the signatures is not material.⁷

5. If the alteration is not apparent and the bill goes into the hands of a 'holder in due course,' the holder can enforce it in spite of the alteration.

6. There is a difference of opinion as to whether the adding of an attesting witness amounts to material alteration. There are a number of Indian decisions in which it has been held that the addition of attesting witnesses to an instrument which does not require attestation is not a material alteration.⁸ Mr. K. Bhashyam, however, does not agree with this rule. He thinks that the addition of attesting witnesses may amount to material alteration. He thinks that, if the attestation added is of respectable persons, it is giving greater respectability to the instrument than was intended. It may also be that the witnesses who originally attested the bill might be dead and the document may be difficult to be proved. The addition of more witnesses may not only amount to forgery, but may also enable the holder to prove the instrument which may otherwise be difficult. He thinks that such a case was not

1. Scholfied vs. Londesborough (1896) A. C. 514, 542; Isac Mahomed vs. Bai Fatima 10 Bom. 487; Carris vs. Tattersall (1841) 2 M & Gr. 890.

2. Madam Pillai vs. Athinarayana Pillai 21 L. W. 532.

3. Tikam Das Javahirdas vs. Ganga Kom Mathur Das 11 Bom. H. C. R. 203, following Aldous vs. Cornwell (1858) L. R. 3 Q. B. 573; Petit vs. Benson (1897) Comberf 452; Mashwe yu vs. K. K. N. K. Raman Chetty (1902) 1 L. B. R. 255.

4. Atwood vs. Griffin (1826) 2 C. & P. 368.

5. Aldous vs. Cornwell (1858) L. R. 3 Q. B. 573.

6. Lala Tulsi Ram vs. Ram Saran Das, 49 M. L. J. 132 (P. C.).

7. Ede vs. Kanto Nath Shaw, 3 Cal. 220.

8. Ko Pe Twe vs. Venkatachellam Chetty U. B. R. (1892-96) 593; Ma Kin vs. C. T. L. Alagappa Chetty U. B. R. (1902) Neg. Ins. 1; Ma Shwe Yu vs. K. K. N. K. Raman Chetty (1902) 1 L. B. R. 255.

originally intended by the drawer of the instrument. This view is based on the English decision, *Shuffell Vs. Bank of England*,¹ in which it was held that the alteration in order to be material should be of an essential nature and need not necessarily vary the contract. Where a document does not require attestation, it cannot be said that the adding of attesting witnesses is to change the original intention of the parties. Attestation is done merely for the sake of the convenience of procedure. It is always for the court to believe or disbelieve the attesting witness according to the circumstances of the case. It is too much to hold that subsequent addition of an attesting witness always amounts to material alteration, specially when it is the common view of the various High Courts in India that such an alteration is not material. A principle settled by a long chain of decisions should not be disturbed until it causes grave injustice to the parties.

7. If an inchoate bill is given to a holder, the filling up of the blanks according to the tenor of the instrument and the intention of the drawer, is not a material alteration.

By an alteration, only the parties at the time of the alteration are discharged. It does not affect the liability of any person becoming a party subsequent to the alteration. If any one endorses an altered instrument even without knowledge of the alteration, he, too, is liable to the endorsee.

Effect of material alteration.

According to the second paragraph of sec. 87 if the endorsee makes alteration in the bill which is material to it, the endorser is discharged of all liability in respect of the consideration of the bill. He cannot sue even on the original consideration. This section is silent as to whether the drawer or payee, if guilty of material alteration, can sue upon the original consideration. The fact that the section makes special reference of endorser or endorsee seems to suggest that the drawer and the payee can sue upon the original consideration.² If the drawer or the payee did not intend to commit fraud by the alteration, he can sue the acceptor on the original consideration,³ but if the intention is to commit fraud he cannot be allowed to sue.⁴

Suit on original consideration in the case of altered or insufficiently stamped instrument.

1. *Alderson vs. Langdale* (1832) 3 B. & Ad. 660.

2. *Saminathan Chetty vs. Palaniappa* 18 C. W. N. 617; *Zulfikar Ahmad vs. Robert Illiet* 87 I. C. 423.

3. *Atkinson vs. Hawdon* (1835) 2 A & E 628; *Payanareena vs. Pana Lana* (1914) A. C. 618.

4. *Gorchandra Das vs. Prasanna Kumar Chandra* 33 Cal. 812.

The next class of suits based on original consideration is that of an instrument becoming inadmissible for want of sufficient stamp. In such a case the plaintiff cannot recover the money by proving orally the terms of the contract.¹ Such suits can be divided into two classes:—

First, those in which there is a complete cause of action for the recovery of money on the foot of a distinct and separate transaction and the promissory note is given as a collateral security.

Secondly, those in which the plaintiff would not have lent the money without the promissory note, and the making and handing over of the note and the payment of the money are concurrent conditions (*i. e.* part and parcel of the same transaction).

In the former case the Allahabad High Court² has held that the plaintiff will be entitled to sue on the original consideration, even if, for some flaw in the promissory note, the pronote itself may not be sued upon, being inadmissible in evidence. The Madras High Court³ and the Lahore High Court⁴ are of the same opinion.

In the second class of suits it is not open to the plaintiff to recover money by proving orally the terms of the contract, if the pronote turns out to be inadmissible in evidence.⁵ The reason is that the debt can be proved only by the pronote itself, being part and parcel of the same transaction as the lending of the money. To allow the terms of the loan to be proved orally will be to go against the provisions of sec. 91 of the Evidence Act. The Madras High Court has taken the same view in a recent case⁶ though for different reasons. If a pronote embodies all the terms of a contract and the note is insufficiently stamped, no suit would lie on it. Sec. 91 of the Evidence Act and sec. 35 of the Stamp Act bar such a suit. If it does not

1. Nazir Khan vs. Ram Mohan Lal A. I. R. 1931 All. 183 (F. B.)

2. Parsottam Narain vs. Tale Singh 26 All. 178 relied on in Nazir Khan vs. Ram Mohan 1931 A. L. J. 64 followed in Ch. Karan Singh vs. Lal Singh A. I. R. 1933 All. 109. Also Salig Ram vs. Radhey Shiam 1931 A. L. J. 522 (In this case pronote was executed in lieu of a prior pronote. Plaintiff was allowed to sue on the first, the second being inadmissible in evidence for want of stamp).

3. Yar Lagadda vs. Gorantala 29 Mad. 111; Mutho vs. Vishwanath 38 Mad. 660.

4. Chandra Singh vs. Amritsar Banking Co. 2 Lah. 330, also see A. I. R. 1922 Nag. 23; A. I. R. 1933 Nag. 7.

5. Nazir Khan vs. Ram Mohan 1931 A. L. J. 64 F. B.; A. I. R. 1932 Mad. 692 and A. I. R. 1933 Mad. 71.

6. Perumal Chettiar vs. Kamakshi Ammal A. I. R. 1938 Mad. 785 F. B.

embody all the terms, the true nature of the transaction can be proved, and where the instrument has been given as a collateral security or by way of conditional payment, a suit on the debt will lie. The fact that the execution of the pronote is contemporaneous with the borrowing, cannot exclude the possibility of the instrument having been given as a collateral security or by way of conditional payment. Whether a suit lies on the debt apart from the instrument, therefore, depends on the circumstances under which the instrument was executed. The Oudh Chief Court¹ held a contrary view, namely, that the factum of the loan can be proved and the suit can be based on the original cause of action even where it is not separable from the instrument. Similar view has been held by the Nagpur High Court² that where the alleged loan and the promissory note are contemporaneous and the note is inadmissible in evidence, the plaintiff can prove the loan apart from the instrument for there was no intention to give the money gratuitously. The Bombay High Court is of opinion that a suit would always lie on the original consideration, whether the loan was anterior to, or simultaneous with the execution of the promissory note.³ The view held by the Allahabad High Court appears to be more reasonable.

On principle there is no difference in the case where the plaintiff sues on the original consideration because of the note being insufficiently stamped and in the case where it is inadmissible having been materially altered. In the case of material alteration, if the alteration is not apparent on the face of it (*e.g.* figure 50 being turned into figure 550) and payment is made in due course, a suit can be based on the original consideration.⁴

Dishonour of a hundi.

As said above, the bill may be presented for two different purposes. It may be presented for acceptance and then for payment. A bill or hundi may be dishonoured either by non-acceptance, or by non-payment. A bill of exchange is an undertaking by the drawer to the payee and to all subsequent holders that the drawee would make the payment according to the tenor of the bill. The bill is usually presented for acceptance in order to make sure

1. Kunwar Bahadur vs. Suraj Baksh A. I. R. 1932 Oudh. 235 F. B.

2. Raja Lal Bahadur Singh vs. Sheikh Ghulam Yasin A. I. R. 1933 Nag. 57.

3. Somabhai Narainbhai vs. Kalyanbhai Kashibhai A. I. R. 1938 Bom. 286.

4. 31 Cal. 249.

that it would be paid on the due date. If the bill is accepted, it would again be presented on the due date for payment. If no payment is made, the bill would be dishonoured, but, if even the acceptance is refused, the bill can be taken as dishonoured straightway. Thus, there can be dishonour by non-acceptance as well as by non-payment. Dishonour by non-acceptance is provided by section 91 which runs as follows:—

Dishonour by
non-acceptance.

“A bill of exchange is said to be dishonoured by non-acceptance when the drawee, or one of several drawees not being partners, makes default in acceptance upon being duly required to accept the bill, or where presentment is excused, and the bill is not accepted.

Where the drawee is incompetent to contract or the acceptance is qualified, the bill may be treated as dishonoured.”

It follows that the bill is said to be dishonoured by non-acceptance in any one of the following circumstances:—

1. Where there is a total refusal to accept. If there are more than one drawees and even some of them refuse to accept, it can be taken as a refusal to accept.

2. If the drawee gives a qualified acceptance, and the holder does not agree to it, the bill is treated as dishonoured.

3. Where the bill is left for 48 hours or such time as the usage of the place may require with the drawee, and the drawee does not signify his acceptance, the bill may be treated as dishonoured.

4. The bill may also be treated as dishonoured even without presentment, if (a) the drawee cannot be found after reasonable search, (b) drawee is incompetent to contract, (c) drawee is a fictitious person, (d) drawee is bankrupt or dead and (e) the presentment is irregular, but the acceptance is refused on some other ground.

If a drawee in case of need is named in the bill, the hundi cannot be taken as dishonoured, unless even the drawee in case of need has refused to accept. In case of dishonour by non-acceptance, the holder gets an immediate right of action against the drawer and all previous endorser.

Dishonour by
non-payment.

It is dealt with in section 92 which runs as follows:—

“A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same.”

After a bill has been accepted it has to be presented

on due date for payment. If the acceptor fails to pay, or refuses payment, the bill is dishonoured. The holder gets a right of action against the drawer, the acceptor, and all previous endorser. There may be cases in which presentment for payment is unnecessary, and the dishonour may be presumed from the circumstances of the case. These cases are provided in sec. 76 which has been discussed under the subject of "presentment." If presentment is excused but the instrument is overdue and has been lying unpaid it can still be taken to be dishonoured.

Notice of Dishonour.

After a bill is dishonoured, notice should be given of the fact to the parties concerned. Giving of notice is necessary under the provisions of sec. 93.

Notice of dishonour.

Sec. 93:—

"When a promissory note, bill of exchange, or cheque is dishonoured by non-acceptance or non-payment, the holder thereof or some party thereto who remains liable thereon, must give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note, or the drawee or acceptor of the dishonoured bill of exchange or cheque."

Before the passing of the Negotiable Instruments Act, there was a great difference of opinion as to whether notice of dishonour was necessary even in the case of hundis. It was held in one set of cases, that notice of dishonour was not necessary under the Hindu law, but, according to mercantile usage prevailing in India, notice of dishonour should be given within a reasonable time.¹ The other view was that no notice of dishonour was needed, and the holder might recover the amount from the drawer, or any endorser, unless any one of them had suffered loss for want of such notice.²

Application of the rule to hundis

Even under the Mohammedan law, it has been held that notice of dishonour is not necessary, but demand for

1. Megraj Jagannath vs. Gokaldas Mathura Das 7 B. H. C. R. (O. C. J.) 137; Tulshi Sahu vs. Narsingram 12 C. L. R. 333; Radha Govind Shaha vs. Chundra Nath Das Shaha 6 W. R. 301; C. W. Joseph vs. E. R. Solano 9 B. L. R. 441; Jeetan Lal vs. Sheochurn 2 W. R. 214; Anunt Ram Agurwalla vs. Nuthall 21 W. R. 62; Huree Mohan Rysak vs. Krishno Mohun Bysak 17 W. R. 442; Gopal Das vs. Seetaram 3 Agra 268.

2. Gobind Ram Marwari vs. Mathoora Sabooya, 3 Cal. 339; T. W. Pigue vs. Golab Ram 1 W. R. 75; Somari Mull vs. Bhairo Das Johury 7 B. L. R. 431; Cf. Syed Ali vs. Gopal Das 13 W. R. 420.

payment should be made within a reasonable time.¹ After the passing of the Negotiable Instruments Act, the Bombay High Court has held that the provisions of section 93 apply to hundis, unless a usage to the contrary is proved.² The Bombay High Court is of the view that the rule should be applied as a matter of course in the actions except for a usage to the contrary. The Allahabad High Court has also held that notice of dishonour should be given even in the case of hundis for the rule is reasonable.³ Although these two High Courts have adopted different reasons but the conclusion is the same.

Object of the rule

The rule is that in case of dishonour, the holder of the instrument must give notice of dishonour to all parties, whom he seeks to charge, except the drawee or the acceptor,⁴ for the acceptor himself knows that he has dishonoured the bill. The rule about notice has always been regarded as a part of the contract, and information is given to safeguard their interest. Notice is given not with the object of demanding payment but to inform the party concerned that the bill has been dishonoured, and the sureties will be held liable. Notice is necessary, whether the bill is payable at sight, or on demand.⁵ It is also needed in the case of accommodation bills.⁶

Therefore, it has been held that a notice of dishonour is a condition precedent for making a party liable.⁷ This rule about notice is applicable also in the case of pronotes.⁸

PERSONS WHO SHOULD GIVE NOTICE.

Who should give notice.

1. The holder.

The notice of dishonour is generally given by the holder. He is also entitled to take advantage of the notice given by any party, who at the time of giving such notice, is himself liable to be sued on the bill, provided the notice is given within a reasonable time.⁹

2. Any party liable under the instrument.

-
1. Gopinath vs. Abbad Hussain 7 B. L. R. 434.
 2. Krishan Shet Bin Ganshet Shetye vs. Hari Walji Bhatye 20 Bom. 488.
 3. Moti Lal vs. Moti Lal 6 All. 78; Madho Ram vs. Durga Prasad 33 All. 4.
 4. Jambu Chetty vs. Palaniappa Chettiar 26 Mad. 526; Jagan Nath Nathu Mal vs. Ram Das Brij Das 243 P. L. R. 1914 : Jagan Nath vs. Ram Das 25 I. C. 881.
 5. 15 Bom. 267, 1919 M. W. N. 780.
 6. Wilkes vs. Jacks, (1794) 1 Peake 267, per Lord Kenyon.
 7. Wilkes vs. Jacks (1794) 1 Peake 267.
 8. Uppalapati vs. Kodali A. I. R. 1931 Mad. 113.
 9. Chapman vs. Keane, (1835) 3 A & E 193; Harrison vs. Ruscoe (1846) 15 M. & W 231.

Sec. 49 clause (4) of the Bills of Exchange Act which is based on the famous case, *Chapman Vs. Keen*¹ provides that any party, liable under the instrument, can give notice of dishonour. In India the law is the same. Section 93 of the Negotiable Instruments Act also lays down that some party who remains liable on the bill can give notice.

3. An agent of the holder or any other person entitled to give notice.

If notice is given by such an agent it is valid.²

4. The legal representative of the holder if he be dead.

5. An acceptor for honour.

An acceptor for honour can also give notice of dishonour.³

6. Parties receiving notice of dishonour.

A party receiving notice of dishonour must transmit the same to all prior parties, in order to make them liable to himself, and the notice should be given within a reasonable time.⁴

A stranger cannot give a notice of dishonour. Such a notice is a mere nullity. It cannot be made valid even by subsequent ratification of the holder.

TO WHOM NOTICE SHOULD BE GIVEN.

1. To a drawer.

To whom notice should be given.

If there be two or more drawers, notice should be given to them all. If they are partners, notice may be given to only one of them and the others would be bound on the principle that notice given to the agent is notice to the principal, for every partner is the agent of the other.

2. To the Manager of a joint Hindu family.

Where there are two or more drawers who are members of a joint Hindu family, it is sufficient to give notice to the Managing member.⁵

3. To an agent.

Notice may be given to an agent of the party who is entitled to such notice, provided the agent is authorised

1. (1835) 3 A & E 193.

2. Sec. 49 (2) The Bills of Exchange Act.

3. *Goodall vs. Polhill* (1845) 14 L. J. C. P. 146; also see *Shelton vs. Braithwaite*, (1841) 8 M & W 252.

4. Sec. 95 of the Negotiable Instruments Act.

5. *Krishna Shet vs. Hariwalji* 20 Bom. 488.

to receive such notice, or the authority can reasonably be presumed from the nature of business done by the agent generally.

4. To an endorser.

The notice of the bill being dishonoured should be given to the endorser, as it is a condition precedent to his being made liable.¹

Even in the case of a hundi notice of dishonour is essential to charge the endorser.²

5. To the legal representative.

If the drawer or endorser be dead, notice of dishonour should be given to his legal representative.³

6. To the assignee of insolvent.

If the person to whom notice is to be given is insolvent, notice may be given to his assignee. It should be noted that notice to the legal representative, or to the assignee, has been left optional under section 94 of the Negotiable Instruments Act.

7. To a dead party.

Under certain circumstances, notice given to a dead party might be valid as laid down in sec. 97 which runs as follows:—

“When the party to whom notice of dishonour is despatched is dead, but the party despatching the notice is ignorant of his death, the notice is sufficient.”

8. To the guarantor.

Notice of dishonour may be given to a guarantor. If, however, the holder neglects in giving such a notice, the guarantor is not discharged for want of such a notice. If he has been prejudiced by such neglect of the holder, he may be discharged only to the extent of injury suffered by him.⁴

Necessity of
notice,

Notice is necessary in order to charge the drawer, to fix the endorser with liability and also because the notice itself gives a cause of action to the holder.

Mode of giving
notice,

The mode of giving notice is prescribed by sec. 94 of the Negotiable Instruments Act which runs as follows:—

1. Jagan Nadha Raddiar vs. Lakshmanan 47 M. L. J. 475, Kaddapa Chetty vs. Tirupathi Chetty 21 L. W. 210.

2. Megraj Jagannath vs. Gokaldas Mathuradas 7 B. H. C. R. 137 (O.C.J.)

3. Sec. 94 of the Negotiable Instruments Act.

4. Warrington vs. Furber, (1807) 8 East 242; Phillips vs. Astling, (1809) 2 Taunt 206; Swinyard vs. Bowes (1816) 5 M & S 62.

Notice of dishonour may be given to a duly authorized agent of the person to whom it is required to be given, or, where he has died, his legal representative, or, where he has been declared an insolvent, his assignee; may be oral or written; may, if written, be sent by post; and may be in any form; but it must inform the party to whom it is given, either in express terms or by reasonable intendment, that the instrument has been dishonoured, and in what way, and that he will be held liable thereon; and it must be given within a reasonable time after dishonour, at the place of business or in case such party has no place of business at the residence of the party for whom it is intended.

If the notice is duly directed and sent by post and miscarried, such miscarriage does not render the notice invalid."

In this section the words "reasonable intendment" have been borrowed from the judgment of Baron Parke in *Hedger Vs. Stevenson*.¹ These words were used in preference to the words "necessary implication," for they are more elastic and may include the possibility of any other inference than what is meant by "necessary implication."

The notice of dishonour may be oral or written, or partly oral and partly written. Notice given orally should be interpreted more liberally.² Under the English law,³ a mere return of the dishonoured bill is sufficient notice but in India, it is not sufficient in as much as it does not fulfil the requirements of sec. 94. The notice must contain all the ingredients laid down in that section. The mere fact that the payee of a hundi met the drawer sometime after maturity and demanded payment, is not a sufficient notice.⁴

The notice 'should' contain the following facts:—

Contents of a notice.

1. That the bill has been dishonoured,
2. The way in which it has been dishonoured, and
3. That the party to whom notice is given, will be held liable thereon.

The notice must identify the instrument, otherwise it would not be valid. A mis-description, which misleads the party to whom notice is given is not sufficient.⁵ Minor mistakes, such as giving wrong names, or mistake in describing the parties, which do not mislead anybody, do not affect the validity of the bill.

1. (1837) 2 M & W 799.

2. *Metcalf vs. Richardson* (1852) 11 C. B. 1011.

3. Sec. 49 (b) of the Bills of Exchange Act.

4. *Sobhomal vs. Pohumal* 5 S. L. R. 168:13 I. C. 255.

5. *Bromage vs. Vaughan*, (1846) 9 Q. B. 608.

The section does not require that the notice must state that the bill had been presented for acceptance or payment.

The notice should state how the bill has been dishonoured *e. g.*, for non-payment or non-acceptance. The principle seems to be based on the following observations in *Hartley Vs. Case*¹:—

“There is no precise form of words necessary to be used in giving notice of dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor.”

The notice must inform the party concerned that he would be liable for the payment of the hundi. Without this information the notice would not be valid.²

Notice should be given within a reasonable time from the date of dishonour.³ What is reasonable time would be discussed later.

The notice should be sent to the place of business of the addressee. If there be no place of business, then it should be sent to his residence. If the holder is ignorant of the place of business, as well as residence, he should make a diligent search to ascertain them.

Notice should be duly sent to the person addressed. The address should be written correctly. If the addressee himself gives insufficient address on the bill,⁴ the holder would be relieved of his liability for default in giving notice. The notice may be sent by post. It is sufficient if the notice is put in the letter-box. It is not necessary to prove that it actually reached the hands of the addressee.

Liability of drawer and endorser arise only on giving notice of dishonour, unless it is excused under section 98. Dishonour is a part of the cause of action of the holder.⁵ The giving of notice is obligatory, and the holder cannot enforce his right against other parties without giving a legal notice of dishonour.⁶ The rule in India is so strict that the drawer and the endorsers, to whom notice of dishonour is not given, are discharged not only from their

How notice
should be sent.

Consequences of
default in giving
notice

1. (1825) 4 B & C. 339; 7 C & P. 555.
2. *Jambu Chetty vs. Palaniappa Chettiar* 26 Mad. 526.
3. *Jagannath Nathu Mal vs. Ramdas Brij Das* 243 P. L. R. 1914; 25 I. C. 881; *Jagannadha Reddiar vs. Lakshmana Reddiar* 47 M. L. J. 475.
4. *Shelton vs. Braithwaite* (1841) 8 M & W 252.
5. *Mulchand vs. Suganchand* 1 Bom. 23, *Ramraoji vs. Prahlad Das* 20 Bom. 133, *Jagannadha vs. Lakshmanan* 47 M. L. J. 475.
6. Sec. 45 The Bills of Exchange Act.

liability on the bill, but also from the original consideration.¹ Notice can be dispensed with only under sec. 98 of the Negotiable Instruments Act.²

The exemptions are given in section 98. They are as follows:—

When notice of dishonour is unnecessary.

(a) When it is dispensed with by the party entitled thereto. The following are instances where it was held that notice of dishonour was not necessary:—

1. The drawer had told the holder that he had no regular residence and he himself would find out from the acceptor if the bill had been paid.³

2. The endorser had told the holder that the bill would not be paid, and no notice need be sent by post. He himself would send the money on a future date.⁴

3. The drawer had informed the holder that the bill would not be paid when presented.⁵

4. The drawer or endorser wrote on the bill "Notice of dishonour waived."

5. Drawer applied on behalf of acceptor for time to pay the bill.

These are all instances of waiver on the part of the person entitled to the notice of dishonour. Where, however, the drawer waives his right of notice in respect of a hundi, and renews it with other hundis, it does not affect his right to object for the other hundis, on the ground of want of notice.⁶

(b) If the drawer has countermanded payment, no notice need be given in order to charge the drawer.⁷ This principle is based on the ground that the drawer, who is guilty of preventing payment to the holder, is not entitled to notice.⁸

(c) No notice is needed when the party charged could not suffer damage for want of notice. Where the drawee has no funds of the drawer, and he is under no obligation to accept the bill, and the bill is dishonoured, no notice

1. Kuttayan Chetty vs. Palaniappa Chetty 27 Mad. 540; Cf. Krishnaji vs. Rajmal 24 Bom. 360.

2. Mithan vs. Paltu 14 I. C. 51; Ram Singh vs. Gulab Rai 1 Lah. 262.

3. Phipson vs. Kneller (1815) 4 Camp. 285.

4. Burgh vs. Legge (1839) 5 M. & W. 418.

5. Brett vs. Levett (1811) 13 East 213, 214.

6. Ram Singh vs. Gulab Rai 1 Lah. 262.

7. Multan vs. Paltu 4 I. C. 514.

8. Hill vs. Heap (1823) Dow and R. N. P. C. 57.

need be given to the drawer.¹ Similarly no notice is needed where the acceptance of the bill was illegal, as it amounted to trading with the enemy.² In such cases the burden is on the party, who wants to come under the exemption, to prove that the person charged did not suffer any damage for want of notice.³

(d) If the party entitled to notice cannot be found after due search, the giving of notice is excused. If the whereabouts of the party are not known, the holder should make a diligent search for his address. The notice should be given whenever the address is ascertained.⁴

(e) If the party is unable to give notice without any fault of his, the default is excused. Such circumstances should be inevitable accidents, *e. g.*, sudden illness of the holder, or breach in the means of communication etc.

(f) If the drawer is the acceptor, no notice is required whether the drawer is only one or many. This rule is based on *Porthouse Vs. Parker*.⁵ The joint drawers are treated as partners, and one of them, being acceptor, is bound to have ipso facto the knowledge of dishonour, and therefore no notice is required for the other drawers.

(g) No notice is required in case of a promissory note which is not negotiable. The note, being not negotiable, the rules about negotiation, presentment, and dishonour would not apply.

(h) If the party entitled to notice, knowing the facts, promises, unconditionally, to pay the amount due on the instrument, no notice is required. This rule is supported on two grounds, first, that the person entitled to notice knows the fact and secondly that he himself waives the notice.

If the bill is dishonoured, one of the duties of the holder is to give notice of dishonour. As has been seen above, the giving of notice is compulsory. It can be excused only under circumstances enumerated in sec. 98 of the Negotiable Instruments Act. Besides this, the party may do something more by way of noting and protest. This is

1. *Bicker Dike vs. Bollman* (1786) 1 T. R. 405.

2. *Sukh Lal vs. Eastern Bank* 46 Cal. 584.

3. *Madho Ram vs. Durga Prasad* 33 All. 4, *Gayadin vs. Sriram* 15 A.L.J 267, *Jhanda Ram vs. Toda Mal* 10 I. C. 405.

4. *The Elmville* (1904) page 319, *Studdy vs. Beesty* (1889) 60 L. T. N. S. 647.

5. (1807) 1 Camp 82, *Jambu Ramaswami vs. Sunder Raja Chetty* 26 Mad. 239.

generally optional and also sometimes obligatory. Noting and protest are technical words applied to what is done by a notary public or other authorized agency. This is the subject of discussion under the next heading.

Noting and Protest.

Besides giving notice of dishonour, the holder of the bill may also cause the bill to be noted or protested. In the case of inland bills, this is optional, but noting and protest is compulsory in the case of foreign bills. The Local Government has appointed notaries public for this purpose. Shortly after a bill is dishonoured, the holder must apply to the notary public, intimating to him that such and such a bill has been dishonoured. He notes these facts in his records and it is called "noting." After this, he makes demand for the bill through an agent or by post, in order to ascertain whether the bill has actually been dishonoured. If it is still left unpaid, he issues a certificate stating therein the particulars of the bill, name of the parties, and circumstances constituting the fact of dishonour. This is called "protest." The protest is an authentic evidence that the bill has been dishonoured. Besides non-acceptance or non-payment, bills are also protested for better security when the acceptor has become insolvent, has suspended payment, or his credit has been publicly impeached. If the acceptor refuses to furnish better security, the notary public shall note these facts, and issue a certificate. The certificate is called "protest for better security." The value of protest is particularly important in case of foreign bills. By this, the holder is saved the tremendous trouble of proving in a foreign land the facts of presentment and dishonour. In the case of hundis, the certificates about dishonour are also issued by chambers of commerce. For instance, in Bombay it is done by the Marwari Chamber of Commerce.

Special rules relating to bills of exchange.

Ordinarily, the interest to be charged is according to the rate mentioned in the bill, but where no interest is mentioned, the interest to be allowed is at the rate of six per cent per annum. This is provided by sec. 80 of the Negotiable Instruments Act which runs as follows:—

Interest.

"When no rate of interest is specified in the instrument, interest on the amount due thereon shall, "notwithstanding any agreement relating to interest between any parties to the instrument" be calculated at the rate of six per centum per annum, from the date at which the same ought to have been paid by the party

charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the court directs."

Explanation.—"When the party charged is the indorser of an instrument dishonoured by non-payment, he is liable to pay interest only from the time that he receives notice of the dishonour."

This provision has two-fold effect. First, that it limits the rate of interest to 6 per cent,¹ and secondly, it does not recognise any collateral agreement between the parties about the rate of interest. Local usage may be set up justifying higher rate of interest.²

Where the instrument is payable on demand, the interest is to run only from the date of demand.³

Where exemption is claimed under sec. 98, it is for the party relying on the provisions of the section to plead the relevant facts and establish them.⁴ In an ordinary contract, the burden of proof of damages is on the party who suffers the damage, but in a suit on a negotiable instrument, where no notice of dishonour is given, but exemption is pleaded on the ground that the person entitled to the notice suffered no damage for want of the notice, the burden of proof that the party concerned suffered no damage, is on the party who claims the exemption. This rule is peculiar only to negotiable securities. If the suit is brought upon a collateral security,⁵ or on the original consideration, the burden of proof would again be shifted to the party who claims to have sustained damage for want of notice.⁶

There is always a great dispute as to what is reasonable time. The Negotiable Instruments Act makes special provision about reasonable time. Under sec. 105 in determining reasonable time for presentment, for acceptance, for payment, for giving notice of dishonour and for noting,

1. *Thakar Singh vs. Ishar Singh* 113 P. L. R. 1911 : 10 I. C. 847; *Banwari Lal vs. Jagarnath Prasad*, 1 Pat. L. J. 71; *Ram Gopal vs. Sitaram* 268 P. L. R. 1913 : 20 I. C. 319; *Samarendra vs. Mahadeo*, 63 I. C. 296; *Kanhaiya vs. Azimullah* 25 O. C. 69; *Laximi Bai vs. Sitaram* 51 I. C. 106 (where 6% was allowed from date of suit); *Amiruddin vs. Saidul Rahman*, 1 Pat. L. J. 71; *Bishun Chand vs. Andu Behari Lal* 2 Pat. L. J. 451.

2. 24 P. R. 1915, A. I. R. 1932 Lah. 582.

3. *Best vs. Haji Mohammad Sait* 23 Mad. 18, 52 Bom. 88 (F. B.)

4. *Jambu Ramaswamy vs. Sundararaja Chetty* 26 Mad. 239, 241; *Amiruddi Bepari vs. Bahadoor Khan* 30 Cal. 977; *Moti Lal vs. Moti Lal* 6 All. 78; *Jambu Chetty vs. Pallaniappa Chettiar* 26 Mad. 526; *Madho Ram vs. Durga Prasad* 33 All. 4; *Jhanda Ram vs. Toda Mal* 10 I. C. 405.

5. *Shunmugam vs. Chinnaswami* 14 Mad. 470.

6. *Krishnaji Narayan Parkhi vs. Rajmal Manick Chand Marwadi* 24 Bom. 360.

Burden of proof about exemption from giving notice of dishonour.

Reasonable time.

regard should be had to the nature of the instrument and the usual course of dealing with respect to similar instruments; and in calculating such time public holidays shall be excluded.

The reasonability of time depends upon various circumstances including the distance of the place where the hundi was drawn, and where it was accepted.¹ It is a mixed question of law and fact.² A hundi was drawn at Gojra in Lyalpur district upon a firm at Karachi, it was held that the delay of 11 days in the presentment for payment of the hundi was reasonable,³ but in another case a delay of 27 days in giving notice of dishonour was held to be unreasonable.⁴ Time spent in ascertaining the address of the party should be given allowance for.⁵ Reasonable time fixed for notice of dishonour is more strict. The notice of dishonour should be given either by the next post, or the day next after the day of dishonour, if the parties are carrying on business in different places. If they live in the same place, notice should be sent in such time as to reach the destination the day next after the day of dishonour.⁶ The time for transmitting the notice of dishonour, in order to charge the prior party, is the same.⁷ Where there are several persons to whom notice has to be sent, notice should be sent to all of them at the same time. Where there are several endorsers, it was held that under sec. 107 the holder cannot claim as many days for transmitting notice, as there are endorsers.⁸ These rules apply to hundis as well.⁹

Rules regarding compensation are contained in sec. 117 which runs as follows:— Compensation

“The compensation payable in case of dishonour of a promissory note, bill of exchange or cheque, by any party liable to the holder or any indorsee, shall be determined by the following rules:—

(a) the holder is entitled to the amount due upon the instrument, together with the expenses properly incurred in presenting, noting and protesting it;

1. 11 Cal. 344; 56 I. C. 936; 1 L. G. 158; 9 Moo. P. C. 46.

2. 19 W. R. 441; A. I. R. 1929 Lah. 577. 11 Lah. 34.

3. 11 Lah. 34.

4. Bahadur Chand vs. Gulab Rai A. I. R. 1929 Lah. 577; 11 Lah. 34.

5. 8 B. and C. 387.

6. Sec. 106 of the Negotiable Instruments Act.

7. Sec. 107 of the Negotiable Instruments Act.

8. 13 C. B. 249; 25 I. C. 81.

9. Anand Ram vs. Nuthal 21 W. R. 62.

(b) when the person charged resides at a place different from that at which the instrument was payable, the holder is entitled to receive such sum at the current rate of exchange between the two places;

(c) an indorser who, being liable, has paid the amount due on the same is entitled to the amount so paid with interest at six per centum per annum from the date of payment until tender or realization thereof, together with all expenses caused by the dishonour and payment;

(d) when the person charged and such indorser reside at different places, the indorser is entitled to receive such sum at the current rate of exchange between the two places;

(e) the party entitled to compensation may draw a bill upon the party liable to compensate him, payable at sight or on demand, for the amount due to him, together with all expenses properly incurred by him. Such bill must be accompanied by the instrument dishonoured and the protest thereof (if any). If such bill is dishonoured, the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill."

Clause (a) of this section relates to compensation paid to the holder. It is the amount due under the instrument, *i. e.* the principal amount together with interest, expenses incurred in presentment for acceptance of payment, notarial charges and other expenses incurred in protesting the bill, together with the commission paid to the collecting agent. Clause (c) deals with compensation to be paid to the endorser, who is himself liable on the bill, and who has paid consideration for it. He is entitled to the sum actually paid to the prior party, interest at 6 p. c. per annum from the date of payment till tender or realisation thereof, and all expenses caused by dishonour and non-payment. It is noteworthy, that the endorser can claim interest only at 6 p. c. per annum no matter what rate is mentioned in the bill. Clauses (b) and (d) relate to re-exchange charges when compensation has to be paid to a holder, living in a different country.

Nakrai Sakrai charges.

The expenses incurred in making presentments for acceptance as well as for payment, and the fees incurred in noting and protest, and other postal expenses, are collectively called in India *Nakrai Sakrai* charges. The charges fixed are different in different places. According to Marwari Chamber of Commerce in Bombay, the charges are as follows:—

1. The rate of *Nakrai Sakrai* is Rs. 1/8/- p. c.
2. The expenses of the postal registration for both the ways, and
3. interest at 9 % per annum.

The Banking Enquiry Committee of 1929 made an elaborate investigation into the matter and came to the following conclusion:—

In para 431 it is said that after a hundi is dishonoured the holder gets a certificate to that effect from Panchayat Sarrafa of the place. After a hundi is certified as above, the seller is liable to pay the following charges to the purchaser:—

(1) A penalty, called *Nikrai Sakrai*, which is usually -/8/-annas. This penalty is Rs. 2/- per cent in Agra, while in Bareilly, it is -/8/ annas per cent on hundis on Delhi and Cawnpore, and Re. 1/- per cent on hundis on Calcutta and Bombay. The *nikrai sakrai* is payable to the sarrafs but not to others.

(2) Arhat or brokerage on the charge made by a correspondent.

(3) Interest at 9 per cent per annum from the date of negotiation of a hundi to the date of repayment of money.

(4) Postage. At some places the postage is fixed at /8/- annas.

(5) When the hundi is negotiated at a discount, the seller pays the actual amount mentioned in the hundi to the purchaser, but when it is sold at a premium, the seller pays the full amount that he originally received. In Bareilly, and some other western districts, there was a custom by which the seller, in case he had originally sold at a premium, repaid at the sarraf's selling rate of the day or at par, whichever was higher. But as there were frequent disputes about this rate, a convention has been created by which the seller of a dishonoured hundi, originally sold at a premium, repays at the rate of Rs. 100/8/- per cent, for hundis on Calcutta and Bombay and Rs. 100/4/- per cent for hundis on Delhi and Cawnpore.

These are the instances of compensation to be paid for a dishonoured hundi in some places in India. The amount may vary from time to time, according to the trade usage recognised by the merchants of the locality.

PRESUMPTIONS.

There are several presumptions about negotiable instruments.

There is a presumption that every negotiable instrument was made or drawn for consideration, and that every

Presumption of consideration.

such instrument, when it has been accepted, endorsed, negotiated, or transferred, was accepted, endorsed, negotiated, or transferred for consideration. Under the ordinary law, a person, setting up a contract, should prove the consideration, but for the facility of trade and having regard to the prevalent commercial usages, a negotiable instrument is presumed to be for consideration.¹ The presumption applies only to negotiable instruments.

It does not apply to non-negotiable instruments.² The presumption is also of no avail in criminal cases, for the prosecution has to prove that the consideration was paid.³

This presumption is very weak and is easily shifted on to the plaintiff according to the circumstances of the case. The following are the instances where the presumption has been shifted to the other party:—

(a) Where the consideration is really different from that mentioned in the instrument, the presumption would not apply.

In a suit to recover money, there was a recital in the note that the amount was borrowed in cash, and the same was the allegation in the plaint. The defendant denied a portion of the consideration. The plaintiff, thereupon, alleged that the consideration was the release of certain proprietary rights to the defendant. It was held that the initial presumption had been rebutted and the plaintiff should prove the consideration.⁴

(b) The presumption cannot be availed of where the plaintiff gives evidence to show that he paid some consideration, but does not give evidence to show how much was paid.⁵

(c) The presumption is rebutted where it appears that the acceptance of a bill of exchange is a forgery, and the instrument has been obtained by unlawful means, or for an unlawful consideration.⁶

1. *R. Shanmuga Rajeshwar vs. Chidambaram A. I. R.* 1938 Privy Council 123.

2. *Chocken vs. Kumarpa Chetty*, L. B. R. (1893-1900), 537, *Tirath Ram vs. Autar Singh* 32 P. L. R. 1914:22 I. C. 861, *Barkatullah vs. Mohammad Hayat Ali* 84 I. C. 866.

3. *Sakhawat vs. Emperor* 18 A. L. J. 1151.

4. *Zohrajan vs Rajan Bibi* 48 P. R. 1915; 28 I. C. 402; *Venkata Ragavulu Chetty vs. Sabapathy Chetty* (1911) 2 M. W. N. 253.

5. *Kishan Ballabh vs. Ghure Mal* 13 A. L. J. 322; *Benode Behari vs. Janki Kalwar* 29 I. C. 468.

6. *Nasir Ali vs. Kher Chand* 36 I. C. 996.

(d) The presumption is also rebutted where the borrower is a young man of extravagant habits and denies the receipt of the full consideration. In such a case, the burden of proving that full consideration was paid is shifted on to the plaintiff.¹

(e) Where the plaintiff's agent made inconsistent statement about the consideration, the court held that the onus had shifted.²

(f) Where the creditor stands in a fiduciary relation to the debtor *e. g.*, a solicitor to his client, the burden of proving the consideration lies upon the creditor.³

(g) Where the execution of the instrument is admitted, but the recital is admittedly false, the burden of proof shifts on to the holder of the instrument.⁴

Every negotiable instrument, bearing a date, is presumed to have been made or drawn on that date and also at the place recited in the instrument.⁵

Presumption as to date and place

Every accepted bill of exchange is presumed to have been accepted within a reasonable time after its date and before its maturity. This clause only applies if the acceptance is not dated. If a date is given on the acceptance, the presumption will be that it was accepted on that date.⁶

Presumption as to time of acceptance.

Every transfer of a negotiable instrument is presumed to have been made before maturity. The presumption is only that the endorsement took place before maturity. There is no presumption about any particular date, unless one is mentioned in the endorsement.⁷

Presumption as to the time of transfer.

There is a presumption that the endorsements were made in the same order in which they are written on the instrument. This presumption may be rebutted by evidence that the successive endorsers were merely co-sureties.⁸

Presumption as to the order of endorsement.

1. Moti Gulab Chand vs. Mohammad Mehndi 20 Bom. 367; Ram Raghubir vs. Jafar Mirza 5 O. C. 307; Barkatullah vs. Mohammad 84 I. C. 866 also see 2 P. R. 1902; A. I. R. 1930 All 568.

2. Sirajuddin vs. Champu 3 Lah. L. J. 439; A. I. R. 1921 Lah. 148; A. I. R. 1927 Lah. 864.

3. Brijendra Nath Malik vs. Srimati Luckhey Moni Dassee 6 C. W. N. 816.

4. P. L. M. Palamappa vs. S. Rajagopala A. I. R. 1928 Mad. 773; A. I. R. 1921 Lah. 148; Sunder Singh vs. Khushi Ram A. I. R. 1927 Lah. 864.

5. Raghunathachari vs. Arayamuthu Iyengar 34 I. C. 617; Kirimani vs. Agha Ali A. I. R. 1928 Mad. 919.

6. Begbie vs. Levi (1830) 1 C. R. & J. 180; Glossop vs. Jacob (1815) 4 Camp. 227.

7. 33 Mad. 34.

8. Kothandaramasami vs. Muthiah Chetty 45 I. C. 186.

Presumption as to stamp.

That is a presumption that where an instrument has been lost or destroyed, it was duly stamped.¹

Presumption as to a holder in due course.

The holder of a negotiable instrument is presumed to be a 'holder in due course': provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained, from the maker or acceptor thereof, by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a 'holder in due course' lies upon him.

Every holder is presumed to be a 'holder in due course,' and is unaffected by failure of consideration as between the other parties.² He is presumed to have paid consideration of the instrument in good faith.³ Where, however, the instrument has been obtained by fraud, or any other unlawful means, the burden of proof shifts on to the holder.⁴ The shifting of the burden takes place only when some offence or illegality is proved.⁵ Where the consideration of a promote was to stifle a criminal prosecution, it was held that it was a circumstance suspicious enough to shift the burden on to the holder.⁶

Presumption about protest.

In a suit upon an instrument which has been dishonoured, the court shall on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.⁷ The protest should be according to sections 99, 100, and 101 of the Negotiable Instruments Act. Where only this much was written in the certificate that the instrument was noted for non-payment, but no date of dishonour was given, it was held that it was not a proper protest, and no presumption can be raised from it.⁸

The rule is contained in section 120 of the Negotiable Instruments Act which runs as follows:—

"No maker of a promissory note, and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for

1. Atma Ram vs. Notem Das Devi Dayal A. I. R. 1930 Sindh 4; 1932 M. W. N. 432.

2. Sakhamam vs. Gulab Chand 16 Bom. L. R. 743. Kishan Bahadar vs. Sassaram Ltd. 2 Pat. L. R. 54; Hindustan Assurance and Mutual Benefit Society vs. Gurdit Singh 6 Lah. L. J. 183; A. I. R. 1924 Lah. 462

3. D. N. Shaha vs. Bengal National Bank, 47 Cal. 871; Royal Bank of Scotland vs. Rahim 49 Bom. 270.

4. Daulatram vs. Nagindas 15 Bom. L. R. 333; Banke Behari Sikdar vs. Secretary of State for India 36 Cal 239.

5. Ramdas vs. Lalchand A. I. R. 1927 Lah. 137.

6. A. I. R. 1927 Lah. 137 also see 24 I. C. 721; 36 Cal. 239; Kumudabammal vs. Kunhikannan A. I. R. 1930 Mad. 141; A. I. R. 1928 Mad. 1238.

7. Section 119 of the Negotiable Instruments Act.

8. Veerappa Chetty vs. Vellayan (1919) M. W. N. 780.

Rules of estoppel about a negotiable instrument. Estoppel against denying original validity of instrument.

the honour of the drawer shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn."

It should be noted that estoppel is only against a 'holder in due course.' Where the instrument offends against the Paper Currency Act, the maker or drawer is not estopped from setting up its illegality, as the payee of such an instrument cannot be said to be a 'holder in due course.'¹

The second noteworthy fact is the mention of the word "acceptor for honour" and the omission of the word "acceptor." This is due to the fact that the case of the acceptor is provided by sec. 117 of the Evidence Act. According to that section, the acceptor of a bill of exchange cannot deny the authority of the drawer to draw the instrument, but he is not debarred from showing that the drawer's signatures are forged, for acceptance does not amount to an admission of the drawer's signatures.²

It is dealt with in section 121 of the Negotiable Instruments Act which runs as follows:—

Estoppel against denying capacity of payee to endorse.

"No maker of a promissory note and no acceptor of a bill of exchange payable to order shall, in a suit thereon by a 'holder in due course,' be permitted to deny the payee's capacity, at the date of the note or bill, to indorse the same."

The drawer of every negotiable instrument enters into a contract with the payee to pay the amount to him, and thereby admits the capacity of the payee to receive the money. If the payee is a competent person to receive money, he has every authority to direct its payment to somebody else, which in other words means a capacity to endorse.

Section 122 runs as follows:—

"No indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument."

Estoppel against denying signatures or capacity of prior party.

The endorser, by his endorsement, represents that the bill is valid, and that he is competent to transfer his rights in the bill to the endorsee. The endorser draws his title from prior parties, and, therefore, owing to his representation to the endorsee, he cannot deny the validity of the source of his title, or, in other words, he cannot deny the capacity of prior parties. This section does not prevent

1. Chidambaran Chettiar vs. Aiyasami Thevan 40 Mad. 585; Mirza Hidayat Ali Beg vs. Nga Kyaing U. B. R. (1914) 11, 13:24 I. C. 721.

2. Chengal Roy vs. Naniapa 117 I. C. 133.

the endorser from asserting the illegality of the hundi, for instance, a hundi payable to bearer.¹

Nature of an attested Shah Jog Hundi.

It very often happens that a shah jog hundi is attested. In such a case it has to be determined as to what is the nature of the instrument, and what is the requisite stamp on it. The question was discussed by the Calcutta High Court in *Jalan Chand Vs. Asa Ram*.² It was held that the shah jog hundi is not a hundi payable to bearer, or a bill of exchange, or cheque payable to order. It is payable to a certain class of persons. Therefore, like an attested promissory note, an attested shah jog hundi should be treated as a bond. The same view was held in a later case³ by the same High Court. It was remarked that such a shah jog hundi is not a bill of exchange, for it does not contain an unconditional order for payment, and it is a bond. The same view was adopted by the Bombay High Court.⁴ The conclusion is that such an instrument is to be treated as a bond and stamped as such.

1. *Alagappa Chetty vs. Alagappa Chetty* 44 Mad. 187; *Arunachalam vs Narain* 42 Mad. 470.

2. (1915) 22 C. L. J. 22.

3. *Kesary Chand vs. Asha Ram*, (1916) 22 C. L. J. 209 also see *Raman Chetty vs. Mohammad Ghosh* 16 Cal. 432; 26 All. 493.

4. *Ram Prasad vs. Sri Nivas* (1925) 27 Bom. L. R. 1122; *Moti Lal vs. Jagmohan Das* (1914) 6 Bom. L. R. 699.

CHAPTER VII.

THE SYSTEM OF BAHİ KHATA.

The system of accounting and account books maintained in commercial circles in India, is an ancient one. It is called "the Bahi Khata System." The purpose of maintaining account books is to answer the following questions:—

- (i) What debts are due to others?
- (ii) What sums are due from others?
- (iii) Whether a particular transaction or set of transactions resulted in gain or loss?
- (iv) Which branch of business yielded profit, and which ended in loss, during a particular period?
- (v) Whether the assets exceed the liabilities and vice versa? In the former case what is the capital sum in the business?

To answer these questions the account books contain two sorts of entries *Nam* and *Jama*. In every transaction either goods or money is received from or is given to others. Whatever is received is entered on the *Jama* or credit side and whatever is given is entered on *Nam* or debit side. Thus the incomings are *Jama* and outgoings are *Nam*. Unlike foreign systems, the words Debit and Credit are not entered in the Bahis on the top of each page. The Indian Bahi has a particular appearance. It is not like a register in which the left and the right pages are stitched in the middle. In a Bahi the stitching is on the top of the page and each page is divided into six, eight, twelve, or sixteen folds, each being called *Sal*. If the Bahi is written in the Mundi, Nagri, Gurmukhi, Bengali or Gujrati script, it is customary to write the *Jama* entries on the left side of the page and the *Nam* entries on the right side. On the other hand, if the Bahi is written in Urdu the *Jama* is written on the right side and the *Nam* on the left. It is the *Sals* which serve as columns. The word *Nam* or *Jama* is not written on the top of the columns.

Nam 'Debit' and
Jama 'Credit'.

The entries of incomings and outgoings and sales and purchases are called *Jama Kharch*.

The daily, weekly, or monthly totallings of the items in the Bahi are called *Mail lagana*.

It is usual to write the heading of the Khata of any person with *Bhai Shri* or *Shah Shri* e.g. *Khata Bhai Shri Prem Chand Ji*. When a main entry is made, its details are given below it, leaving one *Sal* to the left. The place where details are entered is called *Peta*, e.g.

Illustration.

Rs. 3/8 *Shri Kharch Khata*

Rs. 2/- Tweel cloth.	}	<i>Peta.</i>
-/8/- Towel.		
1/-/- Cap.		

When a payment is made through a person, or goods are sent or received through some person, it is called *Haste* e.g. *Haste Ram Nath*, meaning thereby, through Ram Nath. If the owner personally gives or takes, it is written as *Haste Khud* i.e. taken or given personally by the owner.

There are three principal books called *Rokar*, *Khata* and *Naqal* apart from many other miscellaneous books.

Rokar (cash book).

It is a record of all transactions in which money either comes in or goes out. It includes money received and money paid, goods sold for cash and bought for cash, all trade and house-hold expenses, all trade discounts received or paid and the like.

Kachchi & Pakki
Rokar.

It is of two kinds : *Kachchi* and *Pakki* Rokar.

The *Kachchi Rokar* is a rough sort of daily cash book while the *Pakki Rokar* is a properly posted record of cash transactions from the *Kachchi Rokar*. In the *Pakki Rokar* the totalling is generally given daily but some times weekly and bi-weekly also. The *Kachchi Rokar* contains even the entries of transactions of a very temporary character e.g. the price deposited for goods purchased on approval, the loans of only a few hours duration, and the entries made by mistake in which case the rule is not to cross the debit or credit entry but to make a counter entry on the other side. The *Pakki Rokar* contains no such entries.

Example of posting in a Rokar Bahi.

On 1st. January 1939 A had Rs. 500/- in hand. The transactions in the day took place as follows:—

He paid Rs. 300/- to B and Rs. 150/- to C. Rs. 1,000/- were received from D and Rs. 250/- from E. A sent notes of Rs. 350/- under registered cover to F. G sent a parcel to him containing Rs. 375/- and in the evening Rs. 800/- were sent to H by money order.

ENTRIES IN THE ROKAR BAHİ.

Shri Sambat 1995 Miti Pus Sudi 10.

500/- Shree Rokar Baqi	300/- Bhai B ke Nam
1,000/- Bhai D ke Jama	300/- Rokri diya
1,000/- Rokri aya	haste khud
haste khud	150/- Bhai C ke Nam
250/- Bhai E ke Jama	150/- Rokri diya
250/- Rokri aya	haste khud
haste khud	350/- Bhai F ke Nam
375/- Bhai G ke Jama	350/- Note bheja
375/- Rokri parsal	registri bima
me nikla	se
2125/-	800/- Bhai H ke Nam
	800/- Rokri bheja
	Mani ardar se
	1600/-
	525/- Rokar Baqi
	2125/-

TRANSLITERATION:—

1st. January 1939.

Rs. 500/- Cash in hand.	Rs. 300/- Debited against
Rs. 1,000/- Credited to D	B cash paid
for cash received	through self.
through self.	Rs. 150/- Debited against
Rs. 250/- Credited to E for	C for cash
cash received	through self.
through self.	Rs. 350/- Debited against
Rs. 375/- Credited to G for	F for notes sent
cash received in	under insured
parcel sent by	cover.
him.	Rs. 800/- Debited against
	H for cash sent
	to him by M. O.
Rs. 2,125/-	Rs. 1,600/-
	Rs. 525/- Cash in hand.
	Rs. 2,125/-

Similarly sales and purchases made for cash are also treated as cash and are entered in the Rokar.

The cash balance struck at the end of the day is called *Shri Rokar Baqi*. This is carried over to the account of the next day. Every day a new account is begun with the date at the top. On the left hand side is first of all written the *Rokar Baqi* and then all money received and paid in their respective order. The totalling

Rokar Milana.

is done at the end of the day and the cash balance struck. This balance should tally with the cash in hand. This is called *Rokar milana*. If the balance is not equal to the cash in hand there is some mistake in the entries. The regularity with which the *Rokar* is written and the tallying of the written balance with the cash in hand are the two inherent tests of the accuracy and reliability of the *Rokar Bahi*.

In the *Rokar Bahi* the amount of expenditure incurred in the salary of servants, cartage etc., or in domestic expenses is entered either against "*Kharch Khata*" or against "*Mal Khata*;" and in the *peta* details are given with names etc. The money paid under these heads cannot be written against the person who receives the money, for he has in fact paid it up by the sale of his services or goods.

Suppose T is a corn merchant and he purchases 500 maunds of wheat at Rs. 10/- per maund. If this commodity has been purchased for sale, Rs. 5,000/- would be debited against wheat *khata*. If, however, he incurs expenses they would be debited against *Kharch khata* as follows:—

EXPENSES:—Cloth worth Rs. 20/-. Rice worth Rs. 10/-. Rs. 2/- paid for cartage and Rs. 5/- paid to a servant P.

The entry would be as follows:—

Rs. 37/-	Debited against kharch khata Rs. 20/- cloth, Rs. 10/- rice, Rs. 2/- cartage, Rs. 5/- paid to P as wages.
Rs. 37/-	

Batau or
discount.

The discount allowed is of two kinds:—

(i) The wholesale purchaser is often allowed a certain discount on the percentage of purchase. This is called trade discount.

(ii) There is another kind of *Batau* called *Rokara ka Batau*. It is customary in Calcutta, Bombay and other big cities that the purchaser does not pay the price of the goods purchased the same day. There is a period fixed for the payment of the price of each commodity. If a merchant chooses to pay and the seller insists on earlier payment, the interest of so many days is deducted from the price

paid and this is called *Rokara ka Batau*. *Batau* is some times also called *chhut*.

The entries of sales and purchases on credit are entered in the *Nagal Bahi*, but as the posting of the *Nagal Bahi* is somewhat intricate, some times but not often these entries are also made in the *Rokar* for the sake of facility. Three cases can arise under this head:—

Entry of credit
dealings in Rokar

(i) Suppose A purchases goods on credit and at the same time sells them on credit. This means that there has been no transfer of money. If an entry of this transaction is made in the *Rokar*, it is written to the debit of the purchaser and to the credit of the seller, and thus the entries are squared, while the difference is entered to the credit of *Mal Khata* or profit account.

(ii) Suppose A purchases goods on credit but cannot sell them at once. In such a case, the amount is debited to *Mal Khata* (goods account), and credited to the seller. In other words, the *Mal Khata* is responsible for payment to the seller.

(iii) A purchases goods on credit on a certain day and sells the same on credit on a later date. In such a case the first entry would be made as indicated in case (2). When the sale takes place the sale would be credited to the *Mal Khata* and debited to the purchaser.

The following is an illustration of the *Rokar Bahi* kept on the weekly system, showing the cash and the credit transactions for the week. The *Rokar* maintained on the daily system contains entries of a day only. At the end of the day, the balance of cash in hand is struck and carried forward to the next day. Similarly, in a fortnightly *Rokar*, the entries of a fortnight are written at one place, and the cash balance of that fortnight is carried forward to the next fortnight.

A starts business with Rs. 1,000/- on 1-7-36. He buys corn worth Rs. 200/- on 2-7-36, and machinery worth Rs. 200/- on 3-7-36. On 4-7-36 B sells goods on credit to A for Rs. 150/-. A buys corn on credit for Rs. 200/- from C the same day. On 5-7-36 he (A) sells his machinery to D on credit for Rs. 100/- and borrows Rs. 400/- from C the same day. A lends Rs. 160/- to B on 6-7-36 and D pays A Rs. 100/- the same day. He gives Rs. 100/- and corn worth Rs. 150/- to C on 7-7-36. (For the sake of simplicity the rate, weight and other details have been excluded from the illustration).

The posting in the *Rokar* would be as follows:—

Rs. 1,000/-	Cash in hand ledger page 4
Rs. 150/-	Jama to B Rs. 150/- price of goods pur- chased from B on 4-7-36 ledger page 2
Rs. 200/-	Jama to C Rs. 200/- price of corn purchas- ed from C on 4-7-36 ledger page 3
Rs. 100/-	Mal Khata Jama Rs. 100/- price of machinery sold to D on 5-7-36 ledger page 1
Rs. 400/-	Jama to C Rs. 400/- borro- wed in cash on 5-7-36 ledger page 3
Rs. 100/-	Jama to D Rs. 100/- paid in cash on 6-7-36 ledger page 5
Rs. 150/-	Mal Khata Jama Rs. 150/- price of corn sold on 7-7-36 ledger page 1
<hr/>	
Rs. 2,100/-	

Rs. 200/-	Mal Khata Nam Rs. 200/- price of corn purchased on 2-7-36 ledger page 1
Rs. 200/-	Mal Khata Nam Rs. 200/- price of machinery bought on 3-7-36 ledger page 1
Rs. 350/-	Mal Khata Nam Rs. 350/- goods purchased on 4-7-36 ledger page 1
Rs. 100/-	Nam to D Rs. 100/- price of machinery sold to D on 5-7-36 ledger page 5
Rs. 160/-	Nam to B Rs. 160/- paid cash to B through self on 6-7-36 ledger page 2
Rs. 100/-	Nam to C Rs. 100/- paid cash on 7-7-36 ledger page 3
Rs. 150/-	Nam to C Rs. 150/- price of corn sold to C on 7-7-36 ledger page 3
<hr/>	
Rs. 1,260/-	
Rs. 840/-	Rokar Baki (cash balance in hand)
<hr/>	
Rs. 2100/-	

Khata (Ledger).

Khata is prepared from *Rokar* and *Naqal Bahis*. The whole book is called *Khata* and each ledger is also called *Khata*. It is a record of transactions person-wise or goods-wise. The posting of each entry from *Rokar* or *Naqal* is called *Khatiana*. Here is an example of the ledger prepared from the *Rokar* entries given above:—

Page 1

Ledger of Mal Khata

Rs. 100/- Rokar page 10
dated 5-7-36 for
the sale of machi-
nery.

Rs. 150/- Rokar page 10
dated 7-7-36 for
sale of corn.

Rs. 200/- Rokar page 10
dated 2-7-36 for
purchase of
machinery.

Rs. 350/- Rokar page 10
dated 4-7-36 for
the purchase of
goods and corn.

Rs. 200/- Rokar page 10
dated 2-7-36 for
purchase of corn

Page 2

Ledger of B.

Rs. 150/- Rokar page 10
dated 4-7-36 for
goods purchased.

Rs. 160/- Rokar page 10
dated 6-7-36 cash
paid.

Page 3

Ledger of C.

Rs. 200/- Rokar page 10
dated 4-7-36 for
corn purchased.

Rs. 400/- Rokar page 10
dated 5-7-36 cash
received.

Rs. 100/- Rokar page 10
dated 7-7-36 cash
paid.

Rs. 150/- Rokar page 10
dated 7-7-36 for
sale of corn.

Page 4

Ledger of capital account.

Rs. 1,000/- Rokar page 10
dated 1-7-36.

Page 5

Ledger of D.

Rs. 100/- Rokar page 10
dated 6-7-36 cash
received.

Rs. 100/- Rokar page 10
dated 5-7-36 for
sale of machinery

The Khata is usually written date-wise in the order of time, but if some disorder of dates does take place in a Khata by oversight it does not effect its value. To illustrate this, the item of Rs. 350/- dated 4-7-36 is written above the item of Rs. 200/- dated 2-7-36.

If the total of the debit and the credit sides be equal the Khata is said to be squared or *Barabar*; but it is rarely so. Generally a balance is struck on the debit or the credit side. The balance of the credit side is called "*Baqi Dena*" and the balance of the debit side is called "*Baqi Lena*." It is conventional to close a Khata by drawing a double line at the bottom.

This is an example:

Khata 1 Bhai Prem Nath Sheo Nath of Benares.

Rs. 200/- Jeth B. 10 Hundi
 against A of
 Cawnpore.

Rs. 100/- Jeth B. 11 receiv-
 ed in cash.

Rs. 300/-

Rs. 150/- Chait B. 8 sent
 cloth.

Rs. 25/- Baisakh S. 5 sent
 pearls.

Rs. 175/-

Rs. 125/- Baqi Dena.

Rs. 300/-.

Usually one page is allotted to one Khata showing the debits and credits of one person. Each entry contains date, page of *Rokar* or *Naqal* and the amount.

It should also be noted that it is an illustration of Khata maintained on the system of one day entry. In a consolidated Khata the entries contain totals of the entries of the Rokar and the reference is of the Rokar only.

Kinds of Khata.

The principal Khatas are as follows:—

- (1) Mool Dhan Khata.
- (2) Batau Hundiawan Khata.
- (3) Mal Khata.
- (4) Kharch Khata.
- (5) Uchant Khata.
- (6) Batta Khata.
- (7) Hamare Gharu Khata.
- (8) Tumhare Gharu Khata.
- (9) Customers Khata.
- (10) Personal Khata.

I. Mool Dhan
Khata.

Mooldhan Khata is the capital account. It includes the initial capital deposit with which the business is started as well as the balance of profit and loss account of each

year. The deposits of permanent nature made by others are also entered therein.

This includes the trade discount and the *Rokar ka Batau*. The interest received is also entered therein. Some people start a separate *Byaj Khata*. *Hundiawan* is the commission received for payments on the hundis of others.

II. *Batau Hundi-
awan Khata*.

This is a very important Khata. It is called goods account or property ledger. It includes account of property both movable and immovable. All rights of any pecuniary value find place in this ledger *e.g.*, good will, licenses, leases, patents, copy rights, trade marks, manufactured goods, raw materials, stores, tools, machinery, furnitures, fittings, shares, stock and debentures, mortgages and the like. All cash sales and purchases are entered therein. Even credit sales and purchases are also entered unless the sales and purchases cancel each other at the same time. This is an important ledger showing the status of business at any particular time.

III. *Mal Khata*.

ILLUSTRATION:—

Transactions took place as follows:—

Jeth B. 1 Stock in hand	Rs. 1,000/-
Jeth B. 2 Bought velvet	Rs. 500/-
Jeth B. 3 Sold to Amir Singh	Rs. 300/-
Jeth B. 4 Sold cloth in cash	Rs. 100/-
Jeth B. 5 Bought from Ramji	Rs. 400/-
Jeth B. 6 Sold to Krishanji	Rs. 250/-
Jeth B. 7 Sold to Devji	Rs. 150/-

Khata 1

Shri Mal Khata.

Rs. 300/-	Sold to Amir Singh
	Jeth B. 3
Rs. 100/-	Sold cloth in cash
	Jeth B. 4
Rs. 250/-	Sold to Krishanji
	Jeth B. 6
Rs. 150/-	Sold to Devji
	Jeth B. 7
Rs. 800/-	
Rs. 1,500/-	Stock in hand.
Rs. 2,300/-	

Rs. 1,000/-	Jeth B. 1
	Stock in hand
Rs. 500/-	Jeth B. 2
	Bought velvet
Rs. 400/-	Jeth B. 5
	Bought from Ramji
Rs. 1,900/-	
Rs. 400/-	Jeth B. 7 profits
Rs. 2,300/-	

It is to be noted that this *khata* cannot be squared up as long as there are goods left in the godown.

IV *Kharch khata*

Kharch khata records all expenses done to preserve and conduct the business or trade of the concern *e.g.*, expenses of establishment and management, depreciation, repairs taxes, duties, rents, insurance, freight, stationery, office requisites, postage, advertising and publicity, electric charges, cooly, carriage, conveyance, shipping, and clearing charges, Bank charges, and travelling expenses etc. Some times, discount and bad debts are also included in it; but it is usual to keep them separate.

V *Uchant khata*

In *uchant khata* are entered all transactions of which the details are not available for the time being, or transactions of a very temporary character. Suppose the agents travelling abroad should send big sums of money realized from various customers without sending their details. They would be entered in this *khata* till details can be had. Similarly goods sent for approval, or received as samples, are entered therein. It is called Suspense Account according to English system of book keeping.

VI *Batta khata*

Batta Khata is a record of all bad debts which can not be recovered. In the English system it is called "Bad debt reserve account." It is also called *Vridddhi Khata*. It is customary with certain merchants to enter every year a certain percentage (usually five percent) of their profit in his *khata*. It means that the profit is reduced by that amount to keep an allowance for bad debts.

VII *Hamare Gharu khata*

It is usual to send goods to an arhatia for sale. Such goods and expenses are not entered as debit to the arhatia, for the arhatia had not ordered for those goods. The goods are sent on the responsibility of the sender. Such transactions are therefore, entered in a separate *khata* called "*Hamare Gharu khata*." The name and place of the arhatia is entered in the *peta*.

VIII *Tumhare Gharu khata*

Similarly, should any one place an order or send goods for sale, such transactions are written to his account in the *khata* called "*Tumhare Gharu khata*." These *khatas* are prevalent mostly among the Marwari merchants doing business in the eastern part of India.

IX *Customer's khata*

Customers *Khata*s are opened in the names of particular customers, to find out the result of their dealings at a particular time. The account of individual customer is also prepared from these *khatas*.

Personal khatas are the khatas of the partners or owners of a firm. They are also called *Niju khata*. X. Personal Khata.

These are the principal kinds of khatas but further subdivisions or additions might be made for the sake of convenience.

Ankara or profit and loss account is also prepared from the ledger by bringing together on the credit and the debit sides the balance of each khata. If the credit side is in excess of the debit, it means profit, and if the debit side exceeds the credit, it means loss in the trade. Ankara.

ILLUSTRATION:—

Suppose the ledger balances of A are as follows:—

Chait B. 15 S. 1994.

Cash in hand.	Rs. 1,000/-
Goods in hand.	Rs. 500/-
Due from A.	Rs. 200/-
Due from B.	Rs. 300/-
Due from C.	Rs. 400/-
Due to D.	Rs. 500/-
Due to E.	Rs. 600/-

Profit and loss account upto Chait B. 15 S. 1994.

Rs. 500/- due to D.
Rs. 600/- due to E.
Rs. 1100/-
Rs. 1300/- profits.
Rs. 2400/-

Rs. 200/- due from A.
Rs. 300/- due from B.
Rs. 400/- due from C.
Rs. 1,000/- cash in hand.
Rs. 500/- goods in hand.
Rs. 2,400/-

Kachcha Khata is prepared from Kachcha Rokar and Kachchi Naqal. *Rojnawan Bahi* is prepared from Pacci Rokar and Naqal Bahi. It contains monthly totals. It is from the *Rojnawan* that *pacca khata* is prepared. Thus, *pacca khata* contains consolidated entries of a fortnight or a month instead of daily entries as in the case of the *kachcha khata*. The *kachcha khata* contains dates, but the *pacca khata* does not give dates for each entry. This is the practice adopted by very big firms. The smaller firms maintain only one khata, or the *pacca khata* is maintained only as a fair copy of the *kachcha khata*.

Kachcha khata
and Pacca khata

Naqal Bahi.

It has been seen above, that cash book is a record of

Advocate
Jammu
Srinagar

cash dealings and ready sales and purchases. Similarly, the naqal is the book of credit sales and purchases, but this is not all. All entries which cannot conveniently be made in Rokar find a place in the Naqal Bahi. The Naqal Bahi is also called *Jakar Bahi*. Unlike Rokar Bahi there are no Jama and Nam entries in the Naqal Bahi. They go together one under the other. Thus there are only single entries in this bahi. The dates and names etc. find place in the head line while the details of the transaction are entered below it in the *Peta*. Due to the variety of the items which can be written in a *Naqal Bahi* the posting in a *Naqal Bahi* is rather complicated. The following are some of the types of entries which find place besides credit transactions.

I. Ankara Jama
Kharch.

Nothing can come in the khata except through Rokar and Jakar. So the Ankara Jama Kharch (profit and loss balance sheet) is also first made in Naqal. There is the system of changing Bahis annually. So the profit and loss balance sheet is prepared from the old Bahis, and the balance is posted in the Naqal Bahi prepared for the ensuing year. The profit and loss statement is prepared on a piece of paper but it is copied out in the Naqal Bahi to keep a permanent record of it.

II. Bijak Jama
Kharch.

Bijak means the Invoice.

It contains the following particulars:—

(1) The name of the person to whom Bijak is sent and the dates of purchases or sales.

(2) Weight or details of goods and their value.

(3) Arhat charges and brokerage.

(4) Dharmada *i. e.* charity charges.

It is customary for every merchant to charge from his customers a certain sum as commission for charities..

(5) Expenses for the despatch of goods.

(6) Interest and discount.

After a Bijak is prepared and sent, its entries are also made in the Naqal for future reference.

Where transactions are very large and the number of Bijaks sent are too many a separate book is kept called the *Bijak Bahi*.

III. Upana or
Bikri Jama
Kharch

The *Bijak* relates to transactions which the customer has bought or sold. There may be transactions in which goods have been sent to agents in other cities for sale. Such an agent is called Factor. He charges expenses for taking goods to his godown from the Railway Station or the port, godown rent, cartage, commission, etc. After the goods

are sold he sends an invoice containing the net value of the goods after deducting all the above charges. Usually, he does not send money along with the invoice but instructs his constituent to debit the money against him. The entry of this sort is called *Upana* or *Bikri*. It is called "account sale" in the English system. These entries are also made in the *Naqal Bahi*.

In Calcutta and Bombay and also in many up-country cities forward dealings take place in gold, silver, pearl, cotton, linseed, wheat, copper, tin, brass, sovereign, camphor, cloth, jute etc. On the due date either delivery is taken or settlement of differences in value takes place. The entry of these forward deliveries or settlements are made in the *Naqal Bahi*. For the sake of convenience such transactions are generally kept apart and recorded in a *Bahi* called *Sauda Bahi*.

IV. Entries of Forward transaction.

As the profit and loss statement is merely copied in the *Naqal Bahi* in full or abridged so its example need not be given.

Bijak is a letter of sale or purchase sent to a customer abroad giving the details of the transaction.

V. Entries of Bijak.

Example of *Bijak* and its posting in the *Naqal Bahi*.

BIJAK.

Sidh Shri Benares Subhasthan Bhai Shri Ram Nath Ji Yogya Bombay se likhi Shyam Nath Shyam Lal ki Ram Ram Banchana. Aparanch Bora Nag 100 Shakkar ki tumhe bheji, jinki lagat tatha rel rasid is chitthi ke sath sar lena. Puhunchane se pahuncha tatha lagat jama kharch ki likhna.

Rs. 1007/7/- Miti Sawan B. 1 ke hamare is bhanti Jama karna.

Rs. 1000/- Shakkar 100 bora dar Rs. 4/- per maund taul 250 maunds.

<i>Rs. 8/2/- Arhat -/8/- p. c.</i>	<i>Dharmada -/1/- p. c.</i>	<i>Mukadami</i>
<i>5/-</i>	<i>-/10/-</i>	<i>Rs. 2/8/-</i>

Rs. 1008/2/-

Rs. -/11/- Batau bad gaya -/1/- p. c.

Rs. 1007/7/- Baqi Rahe.

Miti Sawan B. 1 S. 1994. Bilti ka pahunch likhna-Mal ki raste ki jokhim tumhari. Bijak ki bhul chuk leni deni.

TRANSLITERATION:—

Greetings from Shyam Nath Shyam Lal of Bombay to Ram Nath of Benares. We send 100 bags of Sugar to you, the price expenses etc. concerning which are being sent herewith along

with the Railway receipt. Please acknowledge receipt thereof and make entries in your account books to our credit.

Rs. 1,007/7/- Please credit to us on Sawan B. 1

Rs. 1,000/- for 100 bags of sugar weight 250 maunds at Rs. 4/- per maund.

Rs. 8/2/- Arhat at -/8/- p. c. Dharmada at -/1/- p. c.
Rs. 5/- Mukadami Rs. 2/8/-

Rs. 1,008/2/-

less -/11/- discount at -/1/- p. c.

Rs. 1,007/7/-

Dated Sawan B. 1, S. 1994. Please acknowledge the railway receipt. The transit at your own risk, errors and omissions excepted.

Jama Kharch in Naqal Bahi.

Rs. 1,007/7/- Debited against Ram Nath Ji of Benares for 100 bags of sugar sent to him.

Rs. 1,000/- credited to Malkhata.
100 bags of sugar weight 250 mds. at Rs. 4/- per maund.

Rs. 5/- credited to Arhat Khata at -/8/- p. c.

Rs. /10/- credited to Dharmada Khata.

Rs. 2/8/- credited to Mukadami Khata.

Rs. 1,008/2/-

Rs. -/11/- debited to discount ledger at -/1/- p. c.

Rs. 1,007/7/- Balance.

VI Bikri Jama
Kharch.

Bikri literally means sale. Suppose Krishan Das of Allahabad sends 50 bags of wheat to Durga Das of Chandausi for sale. He would send the following *bikri* after sale to Krishan Das at Allahabad.

BIKRI.

Greetings from Durga Das of Chandausi to Krishan Das of Allahabad. Received 50 bags of wheat for sale from you. It was sold on Bhadon Sudi 15 Sambat 1995. Its sale was as follows. Please enter in Bahis accordingly

to our debit.

Rs. 400/- dated Bhadon Sudi 15 Sambat 1995.
 50 bags of weight 125 maunds at
 Rs. 3/- per maund Price of bags
 Rs. 375/- at -/8/- each
 Rs. 25/-

less Rs. 6/4/- Arhat at Rs. 1/- p. c. Dallali at -/8/- p. c.
 Rs. 4/- Rs. 2/-
 Dharmada at -/1/- p. c.
 Rs. -/4/-

Rs. 393/12/- Balance.

Please acknowledge. Errors and omissions excepted.

ENTRIES IN NAQAL BAHÍ OF DURGA DAS.

Dated Bhadon Sudi 15 Sambat 1995.

Rs. 400/- Credited to Krishan Das of Allahabad.
 50 bags of wheat weight 125 maunds at
 Rs. 3/- per maund. Price of bags at
 Rs. 375/- -/8/- each
 Rs. 25/-

less Rs. 6/4/- Arhat at 1/- p. c. Dalali at -/8/- p. c.
 Rs. 4/- Rs. 2/-
 Dharmada -/1/- p. c.
 -/4/-

Rs. 393/12/- Balance.

Suppose Prem Nath a commission agent purchases 500 maunds of shellac for his constituent Jagan Nath, and sells the same at a loss. He would enter the transactions in his *Naqal Bahi* as follows:

VII. Entries of settlement of forward transactions

Rs. 1,010/- dated Phagun Sudi 15 Sambat 1994: Debited to Jagan Nath of Bahraich as follows:—

Rs. 6,000/- purchased shellac 500 maunds
 at Rs. 12/- per maund of
 December delivery.

Rs. 60/- Arhat Dalali at Re. 1/- p. c.

Rs. 6,060/-

less Rs. 5050/- Sold 500 maunds of shellec at
 Rs. 10/- per maund.
 Rs. 5000/-
 Rs. 50/- Arhat Dalali at Re. 1%

Rs. 1010/- Net loss.

Below is an example of a transaction with its proper posting in *Rokar*, *Naqal* and *Khata* together with the preparation of profit and loss statement.

On Chait Badi 1 Sambat 1994 A started business with an initial capital of Rs. 500/-. On Chait Badi 3 he bought merchandise worth Rs. 100/-. On Chait Badi 5 he sold goods worth Rs. 75/-. On Chait Badi 7 he again bought goods worth Rs. 400/- from J. P. Sen on credit. On Chait Badi 10 he sold goods worth Rs. 250/- on credit to Phul Singh. On Chait Badi 15 he gave Rs. 250/- to J. P. Sen. On Chait Sudi 3 Phul Singh paid him Rs. 125/-. On Chait Sudi 7 he again bought goods for Rs. 50/- cash. Phul Singh took goods on credit for Rs. 225/- On Chait Sudi 11. On Chait Sudi 13 he bought goods worth Rs. 175/- from Mr. Sen. On Chait Sudi 14 sales worth Rs. 125/- took place. Upto Chait Sudi 15 he had to pay Rs. 5/- as rent and miscellaneous expenses amounting to Rs. 30/-. The goods in hand were worth Rs. 200/-

Page 110.

Pacci Rokar from Chait Badi 1 to Sudi 15 Sambat 1994.

Rs. 500/-	Jama to capital account dated Chait Badi 1.
Rs. 75/-	Mal Khata Jama Chait Badi 5, goods sold for cash
Rs. 125/-	Jama by Phul Singh Chait Sudi 3, cash through self.
Rs. 125/-	Jama to Malkhata for sales on Chait Sudi 14.
<hr/> Rs. 825/- <hr/>	

Rs. 100/-	Nam to Mal Khata for goods purchased for cash Chait Badi 3.
Rs. 250/-	Nam to Mr. J. P. Sen Chait Badi 15 for cash paid.
Rs. 50/-	Nam to Malkhata Chait Sudi 7 for goods purchased.
Rs. 5/-	paid for the rent of the house for one month on Chait Sudi 15.
Rs. 30/-	Nam to Kharch khata for miscella- neous expenses.
<hr/> Rs. 435/- <hr/>	
Rs. 390/- Balance.	

Page 100

Pacci Naqal from Chait Badi 1 to Chait Sudi 15 Sambat 1994.

- Rs. 400/- Miti Chait Badi 7 Jama by Mr. J. P. Sen for goods purchased and Nam to Malkhata.
- Rs. 250/- Miti Chait Badi 10 Jama to Malkhata and Nam to Phul Singh for goods sold to him.
- Rs. 225/- Miti Chait Sudi 11 Malkhata Jama and Nam to Phul Singh for goods sold to him.
- Rs. 175/- Nam to Malkhata and Jama by Mr. J. P. Sen for goods purchased from him on Chait Sudi 13.
- Rs. 150/- Briddhi Khata Jama and Malkhata Nam for goods in hand on Chait Sudi 15.
- Rs. 5/- Makan kiraya khate Jama and Bridhi Khate Nam Miti Chait Sudi 15.
- Rs. 30/- Kharch Khate Jama Chait Sudi 15 Briddhi Khate Nam.
- Rs. 116/- Muldhan Khate Jama and Briddhi Khate Nam for surplus in hand.

Page 1

Khata Capital account.

Rs. 500/- R. P. 110 Chait Badi 1

Rs. 115/- N. P. 100 Chait Sudi 15 profits.

Rs. 615/- Balance on Baisakh Badi 1 Sambat 1994.

Rs. 615/- Balance.

Page 2

Khata Malkhata.

Rs. 75/- R. P. 110 Chait Badi 5.

Rs. 250/- N. P. 100 Chait Badi 10.

Rs. 225/- N. P. 100 Chait Sudi 11.

Rs. 125/- R. P. 110 Chait Sudi 15.

Rs. 200/- N. P. 100 Chait Sudi 15 for goods in hand.

Rs. 875/-

Rs. 100/- R. P. 110 Chait Badi 3.

Rs. 400/- N. P. 100 Chait Badi 7.

Rs. 50/- R. P. 110 Chait Sudi 7.

Rs. 175/- N. P. 100 Chait Sudi 13.

Rs. 150/- N. P. 100 brought from Vridhi khata.

Rs. 875/-

Rs. 200/- balance brought for goods in hand

Page 3

Khata Mr. J. P. Sen.

Rs. 400/- N. P. 100 Chait
Badi 7 for goods.

Rs. 175/- N. P. 100 Chait
Sudi 13 for goods.

Rs. 575/-.

Rs. 250/- R. P. 110 Chait
Badi 15 cash.

Rs. 250/-.

Rs. 325/- Balance due.

Rs. 575/-.

Page 4

Khata Phul Singh.

Rs. 125/- R. P. 110 Chait
Sudi 3 cash.

Rs. 125/-.

Rs. 350/- Balance.

Rs. 475/-.

Rs. 250/- N. P. 100 Chait
Badi 10 for goods.

Rs. 225/- N. P. 100 Chait
Sudi 11 for goods.

Rs. 475/-.

Rs. 350/- Balance.

Page 5

Khata House rent.

Rs. 5/- N. P. 100 Chait Sudi
15 credited after
debit to Vridhi
khata.

Rs. 5/- R. P. 110 Chait Sudi
15 rent for one
month.

Page 6

Khata Kharch khata

Rs. 30/- N. P. 100 Chait
Sudi 15 credit after
debit to Vridhi
khata.

Rs. 30/-

Rs. 30/- R. P. 110 Chait
Sudi 15 Miscella-
neous expenses.

Rs. 30/-

Page 7

Khata Vridhi khata.

Rs. 150/- N. P. 100 Chait
Sudi 15 profit in
mal khata Cred-
ited to this khata
after debit to Mal
khata.

Rs 150/-

Rs. 35/- N. P. 100 Chait
Sudi 15 debited
from kharch and
kiraya khata.

Rs. 115/- N. P. 100 Chait
Sudi 15 on ac-
count of profits
which was credi-
ted to capital ac-
count.

Rs. 50/-

PROFIT AND LOSS ACCOUNT.

Rs. 325/- due to J. P. Sen.

Rs. 6.5/- capital account.

Rs. 940/-.

Rs. 350/- due from Phul Singh.

Rs. 200/- due for goods in hand.

Rs. 390/- cash in hand.

Rs. 940/-

KACHCHA AND PACCA NAQAL:—

Naqal Bahi is also of two kinds, namely, kachcha and pacca. Sarraffs keep kachchi naqal for the posting of the Hundi etc., while the ordinary merchant uses it for daily credit sales and purchases. Many men do not keep pacci naqal Bahi. They use the *Roznawan* instead. In kachchi Naqal, daily credit sales and purchases are entered like "Waste book" of the English system. If one takes a certain thing for mere approval, it will be entered in the kachchi naqal and when it comes back the word "returned" is written where the price should be written. If the goods are not returned for a long time, or are bought, the price is entered in the name of the customer and is noted at the head of the entry.

The pacci naqal is the real Bahi containing the totals of fortnightly or monthly sales and purchases. In some places, only one Naqal Bahi is kept and all transactions other than cash transactions are entered in it datewise without any total.

Other commercial Bahis.

Roznawan is prepared from Pacca Rokar and Pacca Naqal. In Pacci Rokar and Pacci Naqal each entry is of a fortnight. In *Roznawan* the entries are of one month each. It is obtained by adding up two entries of Pacci Rokar or Pacci Naqal. Sometimes, Pacci Naqal is not kept but the work of Pacci Naqal is taken from *Roznawan*. Similarly, some merchants do not keep Pacci Rokar but use *Roznawan* for the purpose. Some people do not keep *Roznawan*. They prepare Pacca Khata from Pacca Rokar and Pacca Naqal; but where Pacca Rokar, Pacca Naqal and *Roznawan* are kept the Pacca Khata is prepared from the *Roznawan*. *Roznawan* is mostly useful to detect mistakes in the profit and loss statements. It is a book used for detecting mistakes in other Bahis.

Roznamcha means Daybook. It is a record of all

Roznawan Bahi.

Roznamcha Bahi

transactions in the order of time, in which they take place. This is a readybook in which all transactions are entered then and there. It is from this book that the entries are transferred to the proper books. It is also called *silak Bahi* in Bombay.

Diary

In the English system of account books the diary is also called Bill Book. It is an account of all accepted bills of exchange, either payable by the trader or to be paid to him. For the sake of convenience it is divided into two books "Bills payable Register" and "Bills receivable register". It contains the following entries:—

- (1) Name of the drawer.
- (2) Name of the drawee.
- (3) Amount.
- (4) Number of the cheque and the bill, if any.

Usually the bill is entered on the same date on which it is likely to mature. It thus conveniently discloses all bills to be paid or received on a particular date.

Monda Bahi.

Monda Bahi is generally kept by Kachcha Arhatias. It contains the weight, rate and other particulars of goods received for sale and when the sale has taken place the sale transactions, including commission, brokerage and other changes, are also entered therein.

Sauda Widh or Sauda Bahi.

Sauda Bahi has gained much importance during recent times. It is a record of all sale and purchase transactions, no matter whether they are for cash or on credit. In this *Bahi* the broker signs all contracts, and gives details and names of the parties in the *Peta*. According to the custom, the broker remains personally responsible for all contracts till the contract forms are exchanged between the parties. It is written datewise.

Sauda Khata.

Sauda Khata is prepared from *Sauda Bahi*. The contracts are arranged firm-wise or person-wise. It discloses the transactions of delivery in future which are cancelled by cross contracts and the transactions left outstanding either on the debit or the credit side. Thus it is of great help in effecting deliveries or settlements on the due dates.

Jama Bahi.

Jama Bahi contains a record of orders received from the constituents, as well as the account of goods purchased for them. In the *Peta*, there is entered the name of the constituent to whose credit the goods are to be written. It also contains an account of trade discount etc., in respect of each order or transaction.

Ankara Bahi is kept on the double entry system, *Ankara Bahi.* i. e. debit and credit. When a customer pays money he enters the transaction in the *Bahi*. On the credit side is entered the name of the customer, and in the *Peta* the page of *Jama Bahi* and the amount. On the debit side is entered the amount due from him, the cash paid, and the discount due. Thus at the end, three different totals are available, (i) the amount at the head of each entry, (ii) the cash amount paid, and (iii) the discount.


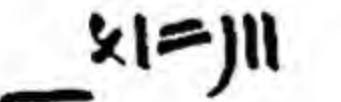
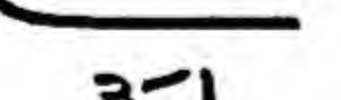
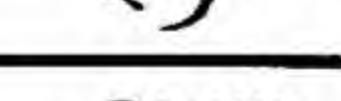
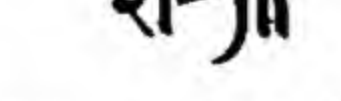
Bilti Bahi is a record of all Railway receipts sent *Bilti Bahi.* to the customers. It contains the following entries:—

- (1) Number and the description of the consignment.
- (2) Weight.
- (3) Freight.
- (4) Number of the Railway receipt, the date of despatch.
- (5) Invoice number and marks.
- (6) Sender's and consignee's names.
- (7) Place of despatch and destination.

Byaj Bahi contains an account of interest due to *Byaj Bahi.* or receivable from others. The entries contain the actual details of the calculation of the interest.

Among Indian traders it is not customary to keep *Chitthi Bahi.* copies of letters. There is a *Bahi*, in which the summary of letters received, and the reply given, are entered together with dates and the amount of stamps levied. This *Bahi* is now getting out of date and big firms maintain correct copies of the letters.

Signs and notations used in Bahi Khata.

 This is the sign of deduction.
 For instance,
 means Rs. 5/6/6 minus Rs. 3/1/- the balance
 being Rs. 2/5/6.


o, v or /

These are the signs used to show that a particular entry has been posted from *Rokar* and *Naqal* to the *Khata*. If an item has been posted in the ledger the accountant would put a mark like o, v or / below or next to it. This is used only to avoid mistake.

There are fixed signs for writing Rupees, annas and pies; and maunds, seers and chataks.

॥०६	half pice.
॥	one pice.
॥	two pices.
॥	three pices.
॥	one anna.
॥	two annas.
॥	three annas.
॥	four annas.
॥	eight annas.
॥	twelve annas.
॥	one rupee.

Thus २३३॥॥ means

Rs. 233/11/6. It is not customary to write the rupee, annas and pice in so many words.

Similarly

॥०॥	quarter chatak.
॥०॥	half chatak.
॥०॥	three-fourth chatak.
॥	chatak.
॥	two chataks.
॥	three chataks.
॥	one pau or $\frac{1}{4}$ seer.
॥	$\frac{1}{2}$ seer.
॥	$\frac{3}{4}$ seer.
॥	one seer.
॥	two seers.
॥	$\frac{1}{4}$ maund.
॥	half a maund.
॥	$\frac{3}{4}$ maund.
॥	one maund.

Thus २१॥॥॥ means

21 maunds 11 seers, $9\frac{1}{4}$ chataks. ॥ This sign denotes $\frac{1}{4}$ maund. The weight of a maund differs with different commodities. The standard weight is 40 seers for a maund. In metal trade of Mirzapur 48 seers make a maund. So ॥ in the bahi of metal merchants there means 12 seers.

System of calculation of interest.

In up-country and among Marwari merchants, the period for calculation of interest is counted by *Miti* or date, while in Gujrat or Maharashtra it is counted by days. The year is always taken to consist of 360 days and each month

of 30 days. Of course in certain years there are 13 months. The extra month is called *Adhikmas* or *Londh*.

The interest is calculated by multiplying the number of days with the number of rupees. This is called *Kachcha Ank*. The product of the number of months with the sum is called *Pacca Ank*. Thus the *Pacca Ank* is got by dividing the *Kachcha Ank* with 30. Interest is calculated only on whole rupees; parts of a rupee are left out.

There are two ways of calculating interest called *Miti kata Byaj* or *katuan Byaj* and *Sada byaj*. Where several items of debit and credit take place the interest is calculated on the balance of each date or the interest is calculated on each item on the debit and credit side from the date of that item to the last date, and then a balance is struck. This is the system of *Miti kata Byaj* and the *Sada Byaj* is simple interest.

CHAPTER VIII.

LAW RELATING TO BAHİ KHATA.

Evidentiary value of Bahi Khata.

The evidentiary value of *Bahī Khata* is laid down in section 34 of the Evidence Act, which runs as follows:—

“Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to enquire, but such statements shall not alone be sufficient to charge any person with liability.”

This section is based upon the principle that the account books which are kept in the course of business are accurate. The business men have full knowledge of the transactions at the time of making the entries and have no motive for entering any thing untrue. There is, therefore, the strongest improbability of falsehood. The entries in the account books are also admissible in evidence under sec. 32 (2) of the Evidence Act as statements made by a person in the ordinary course of business or entries made by him in books kept in the ordinary course of business. In India, great value is attached by business men to entries in a *Bahī Khata* and it is for this reason that sec. 34 does not impose those restrictions which are imposed under the English law.

English Law

Under the English Law, such entries are not admissible in evidence on the ground that such evidence is a violation of the rule that no man shall be allowed to manufacture evidence in his own favour. To make entries in the course of business admissible, they must be shown to have been made contemporaneous with the acts to which they relate. Even then, such entries are evidence only of those things which it was the duty of the person to enter, and are no evidence of independent or collateral matters.

Ingredients of
sec. 34.

There are three ingredients of this section; (1) it should be a book of account (2) it should be regularly kept in the course of the business and (3) it should be corroborated by other evidence.

Book of Account.

A book signifies a collection of sheets of paper bound together with the intention that such binding shall be permanent. A book of account is the collection of a series of entries which are totalled and balanced and from which accounting is possible. Therefore a book merely containing entries

of items which are neither totalled nor balanced is not a book of account.¹

The expression 'regularly kept' does not mean correctly kept.² It only means that the accounts should be kept in accordance with rules or system.³ Books regularly kept in the course of business are those which are kept uniformly and in conformity with the current routine of the person's trade: particular methods of keeping the books may affect their evidentiary value.⁴ The system need not be complicated or elaborate. Even a rough memorandum of accounts kept according to the most elementary principles is admissible.⁵ As far as the question of admissibility is concerned, there is no difference between the books of a reputed firm and the simple day book of a house keeper.⁶ The evidentiary value of the books, however, largely depends upon the formality with which they are kept, as it operates as a check against fraud.⁷

Regular account book.

Regularity of an account book has reference to the system of keeping and maintaining it, rather than to the truth or correctness of its entries.⁸ It must generally be free from mistakes.⁹ If, however, there are only a few mistakes in the account book which is kept in the ordinary course of business, the evidentiary value of the book may be affected but it is admissible in evidence.¹⁰ Accidental slips or mistakes are different from false entries. If certain entries in an account book are proved to be bogus, the entire account book is discredited.¹¹ If a suit is brought on the basis of forged *Bahī Khata*, no decree can be passed even on the admitted sum due by the defendant.¹²

Accuracy of entries in an account book.

Such books should be entered from day to day, or from hour to hour, as transactions take place.¹³ The Privy

Accounts regularly kept in course of business.

1. Mukand Ram vs. Daya Ram 10 Nag. L. J. 44:23 I. C. 893.
2. Gulab vs. Bhagwandas A. I. R. 1932 Oudh 225:138 I. C. 716.
3. Kesheo Rao vs. Ganesh 95 I. C. 128: A. I. R. 1926 Nag. 407.
4. Ram Chandra vs. Emperor 14 C. R. L. J. 262; Aicha Bai vs. Essaji Tej Bhai 19 I. C. 934.
5. Kesheo Rao vs. Ganesh 95 I. C. 128.
- 6 & 7. Mukand Ram vs. Daya Ram 23 I. C. 893.
8. Gulab Halwai vs. Bhagwan Dass A. I. R. 1932 Oudh 225:138 I. C. 716.
9. Kashi Ram vs. Arjundas A. I. R. 1932 Lah. 470.
10. Gulab vs. Bhagwandas A. I. R. 1932 Oudh 225.
11. Seth Nagan Mal vs. Darbari Lal 1928 P. C. 39:30 Bom. L. R. 296:5 O. W. N. 226:47 C. L. J. 222.
12. Nagina Rai vs. Raghubar Singh A. I. R. 1938 Patna 42.
13. Munchar Shaw Bezorji vs. The New Dhuramsey Spinning & Weaving Co. 4 Bom. 576.

Council,¹ however, took a different view. It was held that the Bombay decision gave too limited a meaning to sec. 34. If it were correct, books of merchants and bankers, regularly kept, would in many cases be excluded from being used as corroborative evidence. The entry need not be made at the time of occurrence; it is enough if it be made within a reasonable time. The time of making the entries may affect the value of the account books, but should not, if not made from day to day or from hour to hour, make them entirely irrelevant. It is not necessary that the accounts should be totalled every day.² The books, in which calculations are made in a haphazard way for varying periods of time, are not books regularly kept in the course of business.³ A day book, which has been entered after four months from the happening of an event and the rough notes of which are not available, is not a document which can be said to have been kept in the course of business; the same can be said about ledger which is prepared from such a day book.⁴ Accounts written casually once a week or once a fortnight, though admissible in evidence, do not carry the same weight as books written from day to day and hour to hour as transactions take place.⁵ Accounts, prepared from memory, or inadequate materials, possess little evidentiary value.⁶ Account books, prepared at considerable intervals from memory, may be used as corroborative evidence of the entries for which independent evidence is available.⁷ Books of accounts, containing a record of all transactions made in the course of business, deserve greater weight than those containing entries relating to a particular transaction.⁸

Absence of an entry in an account book.

In some earlier cases, the Calcutta High Court has held that mere absence of an entry in a book regularly kept in the course of business is not relevant to prove the non-existence of that transaction.⁹ This was a case under

1. Deputy Commissioner of Barabanki vs. Ram Prasad 27 Cal. 118:26 I. C. 254: Chandreshwar Prasad vs. Bisheshwar Pratap Narain Singh 5 Pat. 777:101 I. C. 289.

2. Narayan vs. Waman 59 I. C. 121 A. I. R. 1921 Nag. 133.

3. Haroon vs. Emperor 1932 Cr. C. 685: Jasoda Bai vs. Dharam Das A. I. R. 1932 Sindh 186:142 I. C. 271.

4. A. I. R. 1935 Peshawar 444.

5. Banke Behari Lal vs. Brij Behari Lal 51 All. 519:116 I. C. 285: A.I.R. 1929 All. 171.

6. Raja Gopala Naidu vs. Subba Mal 51 Mad. 291: A. I. R. 1928 Mad. 180:109 I. C. 153.

7. Raj Gopal Naidu vs. Subba Mal 54 M. L. J. 703:51 Mad. 291.

8. Bhoiham vs. Ramanathan 4 Bom. L. R. 378:29 Cal. 334 P. C.

9. The Queen Empress vs. Grees Chandra 10 Cal. 1024, Ram Prasad Singh vs. Lakhpati Kuar 30 I. A. p. 1 P. C.:30 Cal. 231.

section 34 of the Evidence Act. In a subsequent case the same court held that the absence of an entry though not relevant under sec. 34 is relevant under secs. 9 and 11 of the Evidence Act.¹ The Privy Council, too, approved this principle.² This decision of the Privy Council has been taken in India as an authority for the admissibility of the absence of an entry in a book of account.³ Where it was usual to enter the expenses of the journey of a partner of a firm in account books, and the question was whether the partner visited Calcutta on a certain date, the entries of expenses of such a journey were held admissible under secs. 9 and 11.⁴ So also an absence of an entry of an alleged payment in a regularly kept account book was held to be relevant to prove that no payment had been made.⁵

Under sec. 34 of the Evidence Act, corroboration is necessary to fix a person with liability. No hard and fast rule can be laid down to find out what kind of corroborative evidence is necessary.⁶ All that this section requires is that the entry should not be left alone but some sort of evidence must be produced in support of it.⁷ What is corroboration of an account book has been explained in various cases. Mere proof of the existence of certain entries in an account book kept in an ordinary course of business is not sufficient.⁸ Nor it is enough to prove that books were written by this or that writer. Each item of the account book must be proved and corroborated.⁹ It is also not sufficient to prove that the books are correct, and have been regularly kept in the course of business:¹⁰ or that there

Corroboration of an entry in account book.

1. Sagar Mal vs. Manraj 4 C. W. N. CCVII Ganga Ram vs. Lachhman Kishan Dayal 28 I. C. 705: 19 C. W. N. 611 see also Queen Emp. vs. Greesh Chandra 10 Cal. 1024 & 30 Cal. 257.

2. Imam Bandi vs. Mutsaddi 45 Cal. 878: 45 I. A. 73 P. C.: A. I. R. 1918 P. C. 11.

3. Tara Kumar Ghosh vs. Kr. Arun Chandra Singh 74 I. C. 383: A. I. R. 1923 Cal. 261; A. I. R. 1925 Cal. 64.

4. Sagar Mal vs. Manraj 4 C. W. N. CCVII, Ganga Ram vs. Lachi Ram 28 I. C. 705.

5. Kasam vs. Haji Jamal 76 I. C. 327: A. I. R. 1924 Nag. 22; Ganga Ram vs. Lachi Ram 28 I. C. 705.

6. M. S. Yesuvadiyan vs. P. S. A. Subba Naicker 52 I. C. 704.

7. Emperor vs. Narbada Prasad 121 I. C. 819: A. I. R. 1930 All. 38: 51 All. 864.

8. T. N. S. Firm vs. U. P. S. Mohammad Husain A. I. R. 1933 Mad. 756: 146 I. C. 608; 96 I. C. 429: Mathilda vs. Fritz A. I. R. 1926 Mad. 955

9. Mathilda vs. Fritz, A. I. R. 1926 Mad. 955; Ganeshi Lal vs. Mangat Ram 76 I. C. 157: A. I. R. 1924 Lah. 540, Abdul Haq vs. Shivji Khem Chand 71 I. C. 259: A. I. R. 1922 Lah. 338.

10. Bahadur Singh vs. Padam Chand A. I. R. 1933 Lah. 384: 141 I. C. 655.

have been dealings between the parties.¹ In another case, however, it has been held that where plaintiff's statement on oath is that the account books are correct, the disputed item, interspersed in an otherwise true account, should not be disallowed merely on the ground that specific evidence of each entry was not produced.² In short, the truth of each entry with which the defendant is sought to be charged must be proved. They may be proved by vouchers, receipts, or other documentary evidence, or by oral evidence.³ The circumstances, surrounding the transaction about which the entries were made, may constitute sufficient corroboration.⁴ Where the hundis corresponded not only with books of account but also with other evidence, it was held that they were genuine.⁵ Thus, there must be independent evidence to show that the entries represent the real and honest transactions, and monies were paid in accordance with the entries.⁶ Evidence merely showing the correctness of account books is insufficient.⁷

Plaintiff's statement as corroboration.

Plaintiff's own statement on oath in support of the entries is sufficient to corroborate the entries in plaintiff's account books.⁸ A general statement by the plaintiff, that the books speak for themselves,⁹ or that the items in the books are correct,¹⁰ or that there were dealings between him and the other party,¹¹ is not sufficient. If, however, the plaintiff deposes from his personal knowledge, and does not merely state the inference which he has drawn from the account books if believed, it constitutes sufficient corroboration.¹² In a case, the plaintiff's examination-in-chief did not reveal whether he was speaking from personal knowledge, or merely from the state of affairs disclosed by

1. Buta vs. Tirlok Chand 100 I. C. 862 : A. I. R. 1927 Lah. 903.
2. Hanwant vs. Akbar Khan 80 P. R. 1910.
3. Lal Mohan Shah vs. Tazimuddin 49 I. C. 756.
4. 88 I. C. 383 : A. I. R. 1925 All. 742.
5. Jaswant Singh vs. Shiv Narain Lal 16 All. 157.
6. Asyu vs. Subra 50 I. C. 704.
7. Bahadur Singh vs. Padam Chand Asa Ram, A. I. R. 1933 Lah. 384, 34 P. L. R. 46.
8. Firm Godha vs. Ditta A. I. R. 1925 Lah. 242 : 6 L. L. J. 504 : 84 I. C. 909.
9. Ganga Ram vs. Kaka Ram 22 I. C. 403; Abdul Ali vs. Puran Mal 25 I. C. 560.
10. Ganga Prasad vs. Indrajit 23 W. R. 390 P. C.
11. Buta vs. Tirlok Chand 100 I. C. 862 : A. I. R. 1927 Lah. 903; Ganesi Ram vs. Mangat Ram 76 I. C. 157 : A. I. R. 1924 Lah. 540.
12. Jodha Mal vs. Ditta 84 I. C. 909 : A. I. R. 1925 Lah. 242, 80 P. R. 1910; Hanwanta vs. Akbar Khan 7 I. C. 1011, 5 P. L. R. 1900 : 68 P. R. 1899; Dwarka Das vs. Sant Bux 18 All. 92.

the books, and no question was put in cross-examination to show that he was deposing from personal knowledge, it was held that the plaintiff must be presumed to have deposed from personal knowledge.¹

If a party has the means of producing better evidence, it is clearly his duty to produce it.² The statement of a book-keeper, who strikes daily balances, is insufficient if the actual items were not paid in his presence.³ Where accounts were prepared by a book-keeper from memoranda supplied by the plaintiff, the statement of the book keeper is not sufficient, and the plaintiff himself must go into the witness box to prove the accounts.⁴ A book keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, no matter if he has forgotten the particular transactions entered.⁵ If it is proved to the satisfaction of the court that the writer of the entries in account books is absconding and cannot be found, the accounts may, under section 32 clause (2) of the Evidence Act, be sufficient evidence to charge the person with liability comprised in the entry.⁶ In a suit for accounts, the plaintiff produced his *Bahis*, and his *Munim* stated that the defendants used to send goods to the plaintiff and also used to purchase goods, that the transaction used to be entered in the *Bahi*, and that the suit was for balance due on account, held that the matter was left in doubt whether the witness was speaking from personal knowledge or without personal knowledge, and that the defendant not having chosen to cross-examine the witness, the plaintiff should be given the benefit of doubt and the evidence should be taken to have been tendered on personal knowledge.⁷

Book-keeper's statement as corroboration.

In the absence of evidence impeaching the accuracy of books of account, the disputed items will be treated as

Appreciation of the value of account books

1. Har Devi vs. Sri Krishna A. I. R. 1932 All. 60:133 I. C. 1900, Jagat Singh Rai vs. Jagat Singh Kawatra A. I. R. 1933 Lah. 212:145 I. C. 157, Dwarka Das vs. Sant Bux 18 All. 92, M. S. Yesuvadiyan vs. P. S. A. Subba Niacker 52 I. C. 704.

2. Ganga Prasad vs. Indrajit 23 W. R. 390, Ganga Ram vs. Kaka Ram 22 I. C. 403, Buta vs. Trilok Chand 100 I. C. 862.

3. Gokul Chand vs. Gulzari Mal 75 I. C. 812: A. I. R. 1923 Lah. 431, Buta vs. Trilok Chand 100 I. C. 862: A. I. R. 1927 Lah. 903, Ganeshi Lal vs. Mangat Ram 76 I. C. 157: A. I. R. 1924 Lah 540.

4. 63 P. R. 1897.

5. Illustration to sec. 180 Evidence Act.

6. Ramaswami Naik vs. Ramanath & Chatty 22 I. C. 627, Ram Pyra Bai vs. Balaji Shri Dhar 28 Bom. 294.

7. Mst. Hardei vs. Kishan A. I. R. 1931 All. 756:133 I. C. 900 1931 A. L. J. 946; A. I. R. 1932 All. 60.

having been accounted for satisfactorily.¹ A *Bahi* account reported by the Commissioner to be correct should be accepted as correct in toto, and certain items disputed by the defendants should not be disallowed, if the defendants did not adduce evidence thereon.² The account books, by themselves, cannot prove the transaction as they are mere corroborative evidence, but where mentioned by some witness, the judge should give some reason why suspicion should be attached to them. It is hardly proper to stigmatise the books of a respectable firm (as such books are difficult to fabricate) without coming to a specific finding that the books produced were as a matter of fact fabricated, and without giving reasons therefor.³ It very often happens in a suit for accounts that one party, knowing that the other party has not got the account books, tries to prove that he has got them, and thereby an undue advantage is tried to be gained by inducing the court to raise an adverse inference against the party not producing the account books. Where the non-production of accounts on either side is plausibly explained, no inference can be drawn against the party either one way or the other from that circumstance.⁴

Value of account books without corroboration.

Under sec. 34 of the Evidence Act, account books are relevant but they are not sufficient without corroboration. The following are, however, the cases in which account books may be taken into evidence even without corroboration.

(a) They are admissible under sec. 32 (2) where the entries were made in the course of business or in discharge of professional duty, provided the writer of the accounts or the entries is dead, cannot be found, has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expence which under the circumstances of the case appear to the court unreasonable. Where the accounts are relevant under sec. 32 (2) it is within the discretion of the court to require or to dispense with corroborative evidence.⁵ A different view,

1. Dwarka Dass vs. Janker Dass 6 M. I. A. 88.

2. Hanwant vs. Akbar Khan 80 P. R. 1910:147 P. L. R. 1910.

3. Damari Chowdhry vs. Nathunimia A. I. R. 1933 Pat. 145:142 I. C. 463:14 Pat. L. T. 61.

4. M. Boota vs. Gur Prasad A. I. R. 1933 Oudh 412:146 I. C. 31:10 O. W. N. 827.

5. Jabir Ali vs. Manmohan Pande 55 Cal 1216: A. I. R. 1929 Cal. 110: 114 I. C. 485; Manmohan vs. Hari Nath A. I. R. 1928 Cal. 408:110 I. C. 338; Abdul Karim vs. Thakurdas 55 Cal. 1167: A. I. R. 1928 Cal. 844; Gopeshwar Sen vs. Bijoy Chand 108 I. C. 883 Rani vs. Bahadur Mal A. I. R. 1922 Lah. 119:63 I. C. 946; Charatter Rai vs. Kailash Behari 44 I. C. 422; Ram Pyra Bai vs. Balaji 28 Bom. 294.

however, has been taken in a Calcutta case,¹ where it was held that though corroboration was not needed formally, it was necessary as a matter of prudence.

(b) An entry in a book of account may be relevant under section 21, if it is against the interest of the person in whose books it appears. In such a case it is used as an admission against the party's interest and the entry does not require corroboration.² Even if the entry was not made by the person but by the party's agent, it will be admissible against the party as an admission.³

(c) The entry may be used to contradict the statement of a witness⁴ or to corroborate his testimony.⁵

(d) Entries in an account book may be used to refresh the memory of a person who is in the witness box.⁶ A book keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knew that the books were correctly kept, although he has forgotten the particular transactions entered therein.⁷

As a general rule, the relevancy of entries in a *bahī khata* is not affected by the following circumstances:—

1. That there are incorrect entries in the book. Mistakes of some kind or other are natural to creep in, but this does not make the account book unreliable, for such mistakes are accidental or clerical. Where, however, it is proved that the *bahī* was suspicious, containing erasures and mistakes, and balances were not struck for six days, the court would have no confidence in such a *bahī*.⁸

2. That the entries were made by a person not having personal knowledge.

3. That the entries were not made contemporaneously with the transactions.

4. That the entries were not made from hour to hour, or day to day.

1. Gopeshwar Sen vs. Bijay Chand 55 Cal. 1167 : A. I. R. 1928 Cal. 854 108 I. C. 883.

2. Jodha Mal vs. Ditta A. I. R. 1925 Lah. 242 : 96 I. C. 429; Mathilda vs. Fritz Goebele A. I. R. 1926 Mad. 955; Nain Lal vs. Nut Behari 38 C. W. N. 861.

3. Nainlal Das vs. Nut Behari Das 38 C. W. N. 861.

4. Makund Ram vs. Daya Ram 23 I. C. 893 (sec. 145).

5. Keyarsosp vs. Gurpad 120 I. C. 224 : A. I. R. 1930 Nag. 24 (sec. 157).

6. Sections 159 and 160; 23 I. C. 893, P. S. A. Subha Naicker vs. M. S. Yesuvadiyan 52 I. C. 704, 120 I. C. 224 : A. I. R. 1930 Nag. 24; Ram Prasad vs. Nathu Ram A. I. R. 1923 Nag. 32.

7. Illustration to sec. 160.

8. Ishwar Dass vs. Mohammad Sharif 1932 Lah. 417 : 33 O. L. R. 715.

5. That the books are not kept according to a particular system.

Value of various
kinds of Bahis.

Entries in a *Bahi Khata*, though required to be proved and corroborated by extrinsic evidence, yet intrinsically different kinds of *bahis* carry different values, and are subject to many kinds of corroboration. *Rokar Bahi* is a primary book of cash transaction, and similarly *naqal bahi* is that of goods account and credit transactions. There are two kinds of these *bahis*, namely *kachcha* and *pakka*. The question very often arises whether the *pakki rokar* and *pakki naqal* are primary books or merely copies of *kachchi bahis*. If they are merely copies, they are inadmissible in evidence, and the primary *bahis* to be produced in court are the *kachcha rokar* and the *kachcha naqal*. The *pakki bahis* may or may not be mere copies. If the entries in *pakka rokar* are merely copied for the sake of fairness, it is not a primary book of account. If, however, the weekly or fortnightly cash accounts are prepared from the *kachcha rokar*, or if the *kachcha rokar* is merely a rough book by way of memorandum, and the accounts are entered systematically in the *pakka rokar*, the *pakki rokar* would be a primary book of account.¹ The same can be said about the *naqal bahi*. Entries in the *lekha bahi* must be supported by corroborative evidence.² The *naqal bahi*, the entries of which were not totalled and in which there was no reckoning of account, was held not to be a proper account book, and hence inadmissible in evidence.³ *Khata bahi* is an account book, prepared from other *bahis*, and therefore its corroboration can satisfactorily be made with reference to the entries in those *bahis* from which it has been prepared.

There are three terms with fixed legal connotation, and need some explanation in connection with account books. They are (1) open, mutual, and current account, (2) account settled, and (3) account stated.

Mutual, open, and current account.

Open and current
account.

An account is said to be 'open and current' when it is continuous, un-interrupted and unclosed by settlement or otherwise, and consists of a series of transactions.⁴ When one makes payments to another, and receives goods

1. *Raja Pyare Mohan vs. Narendra Nath* 9 C. W. N. page 421, *Kesheo Rao vs. Ganesh* 95 I. C. 128, *Maung Sit Kon vs. Ma Sa Ya* 42 I. C. 117.

2. *Lal Bahadur vs. Zalim Singh* 27 I. C. 581 : 2 O. L. J. 1.

3. *Badri Narain vs. Bansidhar* 1924 Nag. 29 : 16 N. L. J. 282.

4. *Ram Prasad vs. Harbans Singh* 6 C. L. J. 158.

from the payee without a clean settlement of every transaction, but with the ascertainment of the exact state of accounts periodically, the account is open and current.¹ A current account is a running account from which the balance due to one may be easily ascertained. The account is open in so far it is unsettled and unclosed.² An open and current account is also called a running account. In a running account, the transactions create obligations on one side only, though on the other, there is a complete and partial discharge of such obligations.³ The test of a current account is, that one particular item should be liable to be united with the other item in case the former dues are not paid.⁴ Thus where one supplies goods, or renders services to another, and the other makes payments towards the goods or services so supplied, and there are series of such transactions, all the transactions are treated as one account.

A mutual account is an account which consists of transactions on either side, creating independent obligations on the other and not merely transactions, which create obligations on one side only; those on the other being merely complete or partial discharge of such obligations.⁵ In such an account, there must be a right to mutual demand,⁶ and each party must have a demand against the other.⁷ It is necessary that each party to the transaction should have received something in cash or kind from the other, and paid something to the other. Each party must be able to say as against the other "I have an account against you."⁸ Mutual account.

Such an account is a combination of current and mutual account. There must be reciprocal dealings between the parties,⁹ and such dealings should be continued as a matter of habit and kept open and current. In order Mutual, open, and current account.

1. *Imrat Lal vs. Lal Chand* 7 I. C. 715 : 75 P. R. 1910.

2. *Gopal Rai vs. Harchand Ram* A. I. R. 1922 Pat. 364 : 3 P. L. T. 492.

3. *Thakur Dass vs. Firm Bishan Dass* A. I. R. 1923 Lah. 636.

4. *Narain vs. Chapsi* 23 Bom. L. R. 1186, *Lila Ram Madhav Das vs. Hussain Bhoi Karimji* A. I. R. 1922 Sindh 15 : 67 I. C. 44.

5. *Hirada Bachappa vs. Gudigi Muddappa* 6 M. H. C. R. 142, *Ganda Singh vs. Bhane Ram Salig Ram* 111 I. C. 791, *Ganesh vs. Gianu* 22 Bom. 606. *Y. M. Bholat vs. M. E. Motala* A. I. R. 1933 Rangoon 224.

6. *Haji Abdul vs. Haji Bibi* 7 Bom. L. R. 151.

7. *Hardilal Ram vs. Pokhan Das* 3 L. L. J. 362, *Dogan Mal vs. Moola* 54 I. C. 453.

8. *Ebrahim vs. Abdul Haq* 27 I. C. 879.

9. *Haji Abdul vs. Haji Bibi* 7 Bom. L. R. 151.

that a transaction should disclose a case of mutual, open, and current account within the meaning of article 85 of the Limitation Act, there must be reciprocal demands, involving transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on one side only, those on the other being merely complete or partial discharge of such obligations.¹

Article 85, Limitation Act.

The words open, mutual and current account appear in article 85 of the Limitation Act, which runs as follows:—

“For the balance due on a mutual, open and current account where there have been reciprocal demands between the parties, the limitation is three years from the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.”

The words, “where there have been reciprocal demands between the parties,” have been interpreted in a Rangoon case.² These words do not mean that there must have been an actual demand by each party from the other, but mean that article 85 applies only to cases, where the course of business between the parties has been of such a nature as to give rise to a reciprocal demand between them, that is, the dealings between the parties must have been of such a nature that the balance might sometimes be in favour of one party and sometimes in favour of the other.

Instances of mutual, open and current account.

An account of advances of money and receipts of part payments does not amount to a mutual account.³

An account consisting of advances by the plaintiff to the defendant on the latter's agreeing to supply goods towards the advances, is not an open, current and mutual account.⁴

Where the plaintiff lends money to the defendant, and the defendant was purchasing goods out of his own money from the plaintiff, and the loans and purchases were debited and credited to one account, it was held to be

1. Bine Kumar vs. Satish Chandra A. I. R. 1936 Cal. 382.

2. Ramaswami Chettyar vs. M. S. M. Chettyar Firm A. I. R. 1936 Rangoon 495 see also Narain Dass vs. Basan Dass 6 Bom. 134, Bhawani vs. Tika 16 A. W. N. 188, Thuppat Veeri vs. Moluguwam 23 M. L. J. 516: 17 I. C. 48.

3. Budh Ram vs. Ralli Ram 37 I. C. 300, Velu vs. Ghosh Mohammad 17 Mad. 293, Ram Prasad vs. Harbans 6 A. L. J. 158, Rup Chand vs. Puhu Mal 73 I. C. 916, Bank of Multan vs. Kamta Prasad 39 All. 35, Gopal Rai vs. Har Chand 66 I. C. 30, Hardial Ram Chand vs. Pokhar Dass 67 I. C. 933.

4. Tea Financing Syndicate Ltd. vs. Kamal Bezboonah 56 Cal. 575: A. I. R. 1929 Cal. 641.

mutual, open and current.¹ An account between a principal and his agent, showing debit and credit account, kept by an agent indicating reciprocal demands between them, was held to be mutual, open and current account.²

Shifting balance has very often been held to be a test of mutuality. In *Narain Das Hem Raj Vs. Visam Dass Hem Raj*³ it was held that Article 9 of the Limitation Act of 1871, which corresponds to Article 85 of the present Limitation Act, applied to cases where the course of business had been of such a nature as to give rise to reciprocal demands between the parties, in other words, where the dealings between the parties were such that sometimes the balance might be in favour of one party and sometimes in favour of the other. It does not mean that there must be a shifting balance, but such a possibility is an important incident of mutual transactions. *Haji Syed Mohammad Vs. Mst. Asrafunnisa*⁴ is an authority for the proposition that the mere fact of balance shifting in favour of either party is a test of mutuality, but its absence cannot be taken to be conclusive proof against mutuality. In *Shivji Gowda Vs. Farnandes*⁵ it was held that as a general rule payments made on account of one party and credited by the other, whether in goods or in money, do not render the accounts mutual, so as to defer the operation of the statute to the date of the last item under Article 85. The test of shifting balance was considered an important piece of evidence of mutuality, but certainly not conclusive. To constitute a mutual, open and current account, it must be shown that there has been a balance, shifting from one side to the other,⁶ or at least a possibility of a shifting balance.⁷ This view seems to have undergone a change. In later cases, it was held that the test of a mutual account is that there should be reciprocal demands, which involve transactions on each side creating independent obligations on the other, and not merely obligations on one side only. The mere shifting of balance on some occasions does not, therefore, render the account mutual.⁸ The conclusion seems to be that shifting

Test of mutual
open and current
account

1. *Firm Baldeo Prasad vs. Firm Haji Ali Mohammad Usman* 27 A. L. J. 73 : 112 I. C. 715.

2. *Lakshmayya vs. Jagannatham* 10 Mad. 119; *Sittya vs. Rangaraddi* 10 Mad. 259.

3. 6 Bom. 134.

4. 5 Cal. 759.

5. 34 Mad. 513.

6. *Sita Rameshwer vs. Amir Bakhsh* A. I. R. 1928 Nag. 127 : 106 I. C. 53.

7. *Fyzabad Bank vs. Ram Dayal* A. I. R. 1924 Pat. 107.

8. *Seth Gokal Dass vs. Radha Kishan* 15 Nag. L. J. 105, *Dasaundi Ram vs. Mool Chand* A. I. R. 1932 Lah. 691 : 140 I. C. 187.

balance between the parties would be an important consideration in determining whether there were mutual demands, but its absence is not a conclusive proof against mutuality.¹ If the shifting of balance from one side to the other was due to accidental slip or oversight, it would not constitute a test of mutuality. It is also possible that an account may be mutual, open and current for some time, and later on may cease to be so. To constitute a mutual account, there need not be two independent sets of transactions. It is sufficient if there be only one set of transactions but that set creates alternately debits and credits which are to be set off against one another.

ILLUSTRATION:

Till December 1928 for some time the account was alternately in credit or debit for small sums; from December 1928, however, it was always overdrawn and this continued till June 1929. The Bank took a promote in 1928 from the customer as security for the amount overdrawn, and then the customer went on making payments in order to reduce his liability for the over-drafts. The last payment having been made in May 1933, the account was closed in May, and the Bank filed a suit in 1935 for the balance of the amount overdrawn. Held, that though the account started as mutual and current, it no longer retained its character as such, but continued on a different footing having changed its nature in June 1929 when the last amount was overdrawn.²

Once it is admitted that the accounts are mutual and current, and that the plaintiff is suing for the balance due, Article 85 would apply, though the parties have ceased to have dealings with each other.³

Account settled.

An account is settled when both the debtor and the creditor after going through the debit and credit items strike a balance and the debtor signs it promising to pay.⁴ For an account to be settled, it is necessary (a) that it

Definition

1. Velu Pillai vs. Ghosh Mohammad 17 Mad. 293, Johar Mal vs. Hari Lal 7 Pat. 238.

2. Bengal Burma Trading Co. vs. Burma Loan Bank Ltd. 1937 Rangoon L. R. 254 : A. I. R. 1937 Rang. 340.

3. Ganesh Lal vs. Shiv Gulam (1879) 5 C. L. R. 211, Lakshmayya vs. Jagannatham (1887) 10 Mad. 199, Murugappa vs. Vyapuri (1916) 22 M. L. J. 536. The Bombay view is opposed to it as in Karsun Das vs. Suraj Bhan 58 Bom. 200, it was held that Article 85 will not apply unless account was open and current at the date of the suit.

4. Abdur Rahim vs. Low & Co. A.I.R. 1925 Rang. 210:3 Rang. 1, Murugappa Chetty vs. Vyapuri 5. L. W. 364; Lakshmayya vs. Jagan Nath 10 Mad. 199.

should be in writing, (b) that it should clearly show the balance due or that no balance is due, and (c) that it should be final. If a balance is struck, a release of all demands may be a settled account. It is usual to write E & O. E. (error and omissions excepted) below an account settled, thereby reserving the right of correction in case of accidental slips or omissions. This qualification does not in any way affect the settlement of account.

If an account is settled and a pronote is executed in lieu of the balance due from the debtor, the pronote is a liability on settled account.¹ It is usual to reduce the account settled in writing, but there may be even an oral settlement of account.² Even acquiescence or silence may amount to acceptance of settlement.³

In order that an account should be settled, there must be a rendition of account. Mere hearing of the account read by a creditor does not amount to a settlement.⁴ Also a vague promise to pay off whatever be due, is nothing more than a mere proposal and it does not amount to a settlement of account.⁵

What is not a settled account

In order that an account may be reopened it is necessary to show that there is some mutual mistake or fraud.⁶ In the case of unimportant errors, the account may merely be corrected, and not reopened. The error should be of an important and fundamental nature. In the case of a settled account, liberty to surcharge, or falsify, or to reopen an account by proving errors or fraud has to be obtained from the court.⁷

Re-opening of an account.

The law relating to re-opening of settled account is explained by Jessel, M. R., in *Williamson Vs. Barbar*.⁸

Re-opening of accounts in a fiduciary relation

"Where the accounts have been erroneous to a considerable extent both in amount and in number of items or where fiduciary

1. *A Rahim vs. Low & Co.* A. I. R. 1925 Rang. 213:89 I. C. 598.

2. *Ayya Swami vs. Chinniah* 3 L. W. 318; *Marimuthu vs. Saminathan* 21 Mad. 366 (contra 16 Mad. 339 not correct).

3. *Hira Lal vs. Lachhmi Prasad* 50 C. L. J. 183: 57 M. L. J. 319:30 L. W. 615 P. C.

4. *P. M. Narainan vs. M. Narainan* 17 I. C. 853; 8 M. L. T. 424.

5. *V. Khan vs. Anand Behari Lal* 52 I. C. 262.

6. *G. Abdulla vs. I. A. Mohamed* A. I. R. 1925 Rang. 99, *Padamraj vs. Gopi Kishan* 56 I. C. 129, *Radha Kishan vs. Tirath* 1 Lah. L. J. 220, *Ibrahim Ahmad Mehtar vs. Abdul Haq* 27 I. C. 379, *T. A. Harst vs. Shiam Sunder Lal Khandelwal* 61 Cal. 64:151 I. C. 334: A. I. R. 1934 Cal. 441, *Prem Dass Radha Kishan vs. Mohammad Hussain Khan* 162 I. C. 882: A. I. R. 1936 Lah. 51.

7. *Bharat Chandra Chakraverty vs. Kiran Chandra Rai* 52 Cal. 766.

8. (1877) 9 Ch. D. 529.

relations exist and a less number of errors are shown or where fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown, the court opens the account and does not merely surcharge or falsify."

The same principle has recently been explained in an Oudh case,¹

"Where a party claims that the account should be re-opened, on the ground of error in accounting, if the Court is of opinion that errors of sufficient number and sufficient magnitude are shown, it is not necessary that errors shown should amount to fraud. If they are sufficient in number and importance, whether they are errors caused by mistake or errors caused by fraud, the Court has a right to open the accounts. Fraud is not necessary. It is further easier to open accounts for a lesser amount of error when the account is between person in fiduciary relation and person who occupies the position of accounting party *i. e.*, the trustee or the agent of the defendant. Where parties having accounts between them meet and agree to settle those accounts by the ascertainment of the exact balance, and do settle on vouchers and information possessed and furnished by either side and if it afterwards turns out that there are errors in the account, it is sufficient ground for opening the account and setting it right. If on the other hand persons meet and agree not to ascertain the exact balance but agree to take gross sum as the balance, a sum which one is willing to pay and the other is content to receive as the result of those accounts, the account cannot be re-opened. The balance may, however, be vitiated by fraud or the transaction may not be fair or may not have been fully understood by either from the confusion involved or misrepresentation made on the one side."

The accounts can be re-opened on grounds of fraud and error in the case of all fiduciary relations, for instance trustee, agent, guardian etc.²

Even the fraud of the plaintiff's employee in submitting the accounts is sufficient to allow the equitable relief of re-opening settled accounts, even though the defendant against whom the accounts are sought to be re-opened, was no party to the fraud. In any event, a fundamental mistake is a ground for re-opening settled accounts.³

Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance. If after such settlement, it turns out that the creditor has been paid sums which were not really due to him, and that there are errors in the account, there

Re-opening of account due to fraud by an employee.

Re-opening of account in case of excess payment.

1. *Bachche Lal vs. Bundu Mal* 9 Luck. 230:147 I. C. 536: A. I. R. 1933 Oudh 557.

2. *Bhagwan Bakhsh Singh vs. Joshi Damodar Ji* 42 All. 230:59 I. C. 20.

3. *T. A. Harst vs. Shiam Sunder Lal Khandelwal* 61 Cal. 64, 151 I. C. 334: A. I. R. 1934 Cal. 441.

is sufficient ground for re-opening the account and for setting it right. It is open to the debtor, who has made excess payment, to have the account re-opened, and to claim a refund of the amount which has been wrongly taken into consideration, and the creditor is bound to refund the said amount.¹

1. ACQUIESCENCE.

In a suit on a bond executed on the settlement of accounts, the correctness of the balance, which had been acquiesced in by making certain payments, cannot be disputed.² Similarly, a person cannot, after having previously acknowledged the correctness of account by means of an examination of accounts and execution of a pronote therefor, be allowed to question the settlement and re-open the accounts.³ If an account has been rendered, and has long been acquiesced in, unless fraud be proved, a court will not re-open it although account may be erroneous.⁴

When settled accounts cannot be reopened.

2. WAIVER.

In the case of a settled account, where a principal with his eyes open pays an over charge, he cannot be heard to object later on about mistakes in the accounts.⁵

3. COMPROMISE.

If a party, of his own free will and accord, waives his right to an examination of the accounts, and agrees to treat a gross sum as due from him, he cannot re-open the account, as the new debt is the result of a settled account, or of a settlement by compromise.⁶

A settled account may be re-opened in part or in whole.⁷ If circumstances are proved which justify a re-opening of accounts, re-opening will be allowed only from the stage of previous settlement. If fraud is alleged after a mortgage, the consideration for which was a balance of a settled account, the account from the date of the mortgage will be re-opened and a party will not be allowed to go behind the mortgage, and reopen the account settled at the

Extent of re-opening of accounts.

1. Krishna Bhatta vs. Ishwara Bhatta 1937 M. W. N., 376: 45 L. W. 641: 169 I. C. 860: 10 R. M. 107: A. I. R. 1937 Mad. 579.

2. Narain Undir Patil vs. Moti Lal Ram Dass 1 Bom. 45.

3. Benai Prasad Pandey vs. Vishnu Datt Pathak 3 All. 308.

4. Gokul Krishan Dass vs. Shashi Mukhi Dasi 15 C. L. J. 204.

5. A. Rahim vs. H. V. Low & Co. 89 I. C. 598: A. I. R. 1925 Rang. 210.

6. M. Khub Chand vs. L. Ram Pratap 10 Bom. L. R. 281: 32 Bom. 353.

7. G. Abdulla vs. I. A. Mohamed 75 I. C. 171.

time of the execution of the mortgage deed.¹ Where a single item of fraudulent entry is discovered in a settled account, the court should not reopen the whole account but leave must be given to surcharge and falsify.² In the case of minor errors, account should not be re-opened, only adjustment should be made.³

Account stated.

Meaning of
account stated.

An account becomes an account stated, when items of credit, if any, are set off against the debits, and the balance is struck to the knowledge of the debtor in favour of one of the parties. Such an account carries with it an implied promise to pay the balance.⁴ The essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree to the several amounts of each, and treat the items so agreed on one side, as discharging the items on the other side *protanto*, and go on to agree that the balance only is payable.⁵ Such a bilateral transaction creates a new debt, and a new cause of action.⁶ For an account stated, it is not material whether the debt in favour of a creditor was created at the outset by one large payment, or consisted of several sums of principal and several sums of interest; nor whether the only payments made on the other side were simply payments in reduction of such indebtedness, or were payments made in respect of other dealings; nor whether the balance of indebtedness was thrown out in favour of one side. It is also immaterial that at least some of the items included in the account were, at the date of such accounting, statute-barred. An account stated is binding save that it may be re-opened on any ground, such as fraud or mistake, which would justify the setting aside of any other agreement. In a case⁷ the plaintiffs were money-lenders, and had been lending money to the defendants for 25 years. On a date within three years of the institution of the suit, an account between the parties was taken, a balance was struck and was signed by the defendants; held, that this was an account stated. In common parlance, an account stated is treated

-
1. *Ramji vs. Kanon Dass* 35 I. C. 603.
 2. *A. Rahim vs. H. V. Low & Co.* A. I. R. 1925 Rang. 210.
 3. *Bachey Lal vs. Gondul Mal* A. I. R. 1933 Oudh 557: 10 O. W. N. 216.
 4. *Suraj Prasad vs. Boneke* 56 I. C. 379.
 5. *Satis Chandra vs. Rampada* A. I. R. 1938 Cal. 861.
 6. *Rama Rakha vs. Ram Sunder Dube* A. I. R. 1925 All. 295: 86 I. C. 834.
 7. *Bishan Chand vs. Girdhari Lal* 1934 A. L. J. R. 623 P. C.

as an admission by a defendant of dues from him to the plaintiff. There is, however, also a real account stated which is equivalent to what is called, in the old law, an *insimul computavereut*, when several items of claims are brought into account on either side, and are set off against one another, and a balance is struck, the consideration for the payment of the balance being the discharge on each side. This is, no doubt, the true sense of account stated, that is each party resigns his own rights on the sums he can claim, in consideration of a similar abandonment on the other side, and of an agreement to pay, and to receive in discharge, the balance found due.¹

1. Writing and signatures are not necessary.

Essentials of an account stated.

Account stated may be proved by oral evidence. It need not necessarily be in writing or signed by the debtor.² It is sufficient, if it is submitted to the party and the party has, by words or by conduct, acquiesced in its correctness.³ If, however, the defendant signed a written acknowledgment that a certain sum was due by him to the plaintiff, that would be an account stated.⁴

2. Reciprocal demands.

Reciprocity of demands need not be present to constitute an account stated.⁵ This is the view of the Calcutta High Court but the other High Courts differ. Where there are no cross demands to set off against each other, but the account consists merely of debits on one side and payments made by the debtor on the other, a balance, though struck and signed, is not an account stated.⁶

3. Mere acknowledgment is not an account stated.

Mere striking of balance is not an account stated, as it does not constitute an agreement to pay.⁷ Acknow-

1. Nahani Bai vs. Nathu Bhan 7 Bom. 414 at p. 417 quoting judgment of Blackburn J., in Laycock vs. Pickles 33 L. J. Q. B. 43.

2. Pooranima Chowdharin vs. Wittamud Shah W. R. 82 F. B., Ayya Swami Chetty vs. Chinnia Nair 3 L. W. 338, Marimathu vs. Saminatha 21 Mad. 366 (disapproving of the earlier decision in Amuthu vs. Muttraya where in an account stated writing and signature of the debtor was held essential).

3. Haji Abdul vs. Haji Bibi 7 Bom. L. R. 151, Tarnik Charan Nandi vs. Sh. Abdul Rahman 2 C. L. R. 346.

4. Manju Nath Kamti vs. Devamma 26 Mad. 186.

5. Sarifun Maudalin vs. Feradaoul Khatun A. I. R. 1923 Cal. 578.

6. Nahani Bhai vs. Nathu Bhan 7 Bom. 414, Shanker vs. Mukha 22 Bom. 513, Zulfiqar Husain vs. Munnalal 3 All. 148, Jamun vs. Nand Lal 15 All. 1; See Gopi Nath vs. Chameli 1938 A. L. J. 773 (where the account was reciprocal for sometime and then one sided).

7. V. Khan vs. Anand Behari Lal 52 I. C. 262, Ganga Prasad vs. Ram Dayal 23 All. 502, Tribhuvan vs. Amina 9 Bom. 516, Shanker vs. Mukhta 22 Bom. 513, Satis Chandra vs. Rampada A. I. R. 1938 Cal. 861.

ledgment simply keeps the debt alive, and the debtor can dispute the correctness of the items constituting the account, whereas in an account stated, the prior entries need not be gone into.¹

4. Mere accounting is not an account stated.

Where there are no cross claims to be set off, and no new agreement for appropriation, a settlement of the balance due on the examination of account is merely a statement of an antecedent debt. Where the party simply agreed to show how much of the debt remained due, there was no new contract and was not an account stated.²

5. There must be a settlement of reciprocal demands, and the balance must be struck to signify a new contract.

The nature of an account stated was indicated in a Madras case³ as follows:—

“What we must look to see is whether the arrangement involved any new consideration for the promise to pay the balance. Now, where there are cross demands, and on a settlement of accounts, items agreed to on one side are wiped out by an appropriation to the discharge of admitted items of claim on the other side, and thereupon a balance is struck and payment is promised, the natural agreement to set off pro-tanto one set of items against the other, constitutes a new consideration for the promise to pay the settled balance and both make a new contract.”

Thus it will be seen that there should be (a) an examination of accounts (b) setting off one debt against another and (c) striking off a balance which was to constitute a new contract express or implied. The essence of an account stated is that there must be a new contract. Where the defendant signed a written statement that a sum of money was due to him by the plaintiff that would be an account stated even if there were no credit and debit entries on both sides.⁴ If each party should have resigned his own rights in consideration of a similar abandonment on the other side an agreement to pay or to receive such a balance would constitute an account stated.⁵ Even in a

1. *Rose vs. Savory* 2 Bing. N. C. 145.

2. *Hirada Haribasappa vs. Gadigi Muddappa* 6 M. H. C. R. 197, *Gokul vs. Shashi Mukhi* 16 C. W. N. 299:5 C. L. J. 204, *Ganga Prasad vs. Ram Dayal* 23 All. 502, *Jwala Dass vs. Hukam Chand* A. I. R. 1922 Lah. 316.

3. *Hirada Karibasappa vs. Gadigi Muddappa*, 6 M. H. C. 197.

4. *Manju Nath vs. Devamma* 26 Mad. 186.

5. *Nand Ram vs. Ram Prasad* 2 All. 641, *Nahani Bai vs. Nathu Bhan* 7 Bom. 414, *Sital Bakhsh vs. Imam Bakhsh* 1883 A. W. N. 47, *Khan Chand vs. Daya Ram* A. I. R. 1929 Lah. 263, *Jwala Dass vs. Hukam Chand* A. I. R. 1922 Lah. 316.

mutual, open and current account there can be a settlement of account without there being an account stated.¹

The term "account stated" comprises four varieties (i) Mere account rendered, which is not any kind of "account stated" at law and has no legal effect. (ii) Unilateral account stated, which is account stated consisting of a claim to payment made by one party and admitted by the other party to be correct. It is of no more effect than any other admission. (iii) Cross account stated. It is something more than an admission, but subject to the equitable doctrine of surcharging or re-opening settled accounts. (iv) Account stated for good consideration. They constitute binding contracts at law, which can only be challenged or "reduced" upon grounds, such as mistake, fraud, etc. With reference to the fourth class, the consideration may consist of a reduction of the claim, consent to wait for payment, or any other matter involving a consideration for the agreement to pay. Where all that the defendant did was only to correct a mistake in the rate and amount of interest in the accounts taken, it is not supported by consideration. It is a case of account stated of the third variety, which is liable to be surcharged or re-opened.²

Varieties of account stated, and their consequences

An account stated itself is an agreement which can be sued upon.³ It is open to the plaintiff to base his suit either on an account stated, or on the original debt.⁴ An account stated is itself a cause of action, the consideration being the ascertainment of the state of account, and the promise to pay implied in the admission of the balance.⁵ A suit on an account stated which is not signed by the debtor must be regarded as one for money lent *i. e.* on original consideration.⁶ If, however, the account stated is signed by the debtor, there is an implied contract of the admission of the account and the payment of the balance found due.⁷

Whether an account stated constitutes a cause of action.

Four cases can arise under this head:—

1. If the account stated is in writing, and is signed

Account stated and limitation

1. Murugappa vs. Vyapuri 32 M. L. J. 536; Lakshmayya vs. Jagan Nathan 10 Mad. 119; Marimuthu vs. Swaminatha 21 Mad. 366; Zalim Singh vs. Chunni Lal 15 C.W.N. 882; Ganesh Lal vs. Shiv Gulam Singh 5 C.L.R. 211; Lalji Sahu vs. Raghunandan Lal Sahu 6 Cal. 447.

2. T. A. Hurst vs. Shyam Sunder Lal Khandelwal 61 Cal. 64; A. L. R. 1934 Cal. 477; 151 I. C. 334; 7 R. C. 107; A. I. R. 1934 Cal. 441.

3. Bisheshwargir vs. Sri Krishan Shah Chowdhri 24 W. R. 440.

4. Bhattu vs. Bibi 63 I. C. 280.

5. Hansraj vs. Lalji 28 Bom. 447.

6. Thakuria vs. Shiv Singh Rai 28 All 872.

7. Umed Hukam Chand vs. Bulaqi Dass Lal Chand 5 B. H. C., O. C. 16.

by the party liable, it falls under Article 64 of the Limitation Act and limitation will commence from the date of the account stated, that is, the settlement made.¹

2. If the account stated is not signed but relates to mutual, open and current account, the limitation will run, in this case as well from the date of settlement, according to Article 85.²

3. If the account stated is neither signed by the debtor nor does it relate to open, mutual and current account, limitation will not run from the date of settlement, but only from the last item.³

4. If the account is registered, the limitation will be enlarged from 3 years to 6 years under Article 116 of the Indian Limitation Act.

1. Bisheshwargir vs. Sri Krishan 24 W. R. 440; Zulfiqar Hussain vs. Munna Lal 3 All. 148; Dukhi vs. Mohammad 10 Cal. 284, 2 All. 872; Amirathu vs. Muthayya 16 Mad. 339.

2. Zalim Singh vs. Chunni Lal Johri 15 C. W. N. 882.

CHAPTER IX

WORKING OF THE CHAMBERS AND COMMERCIAL ARBITRATION.

A chamber is an association of traders engaged in a particular trade. In India the formation and development of chambers has taken place only recently. The idea has been borrowed from the Western countries. The Chambers are generally registered as joint stock companies under the Companies Act. They are growing so fast that in U. P., even small towns like Shamli and Sikandrabad have chambers. There are also some chambers which are unregistered. They are no more than unregistered firms carrying no safeguards. Such chambers are wholly irregular. The functions of the registered chambers or *sabhas* only would be dealt with in this chapter.

The functions of these chambers are as follows:—

To promote the interests of particular kind of traders and offer facilities for the development of business.

The chambers, dealing in agricultural produce, shelloc or such commodities, supervise the quality of goods given at the time of deliveries. A certain amount of goods of a standard quality is kept as sample in the chamber. If the quality falls lower than that standard, a margin is provided for in the rate at which the price is to be calculated. In wheat and linseed, there is very often a mixture of other seeds and a certain amount of dirt. The wheat is also of varying quality. In forward transactions in wheat, only *bijaks* are sold. A *bijak* is supposed to be of 200 mds. of wheat in Muzaffarnagar whilst in Hapur, Ghaziabad, Khurja, Chandausi, Cawnpore, Lyalpur and other places it signifies different quantities. At the time of the transaction, only the rate, the month of the delivery, and the number of the *bijaks* are mentioned. Nothing is said about the quality of the wheat. The quality is supposed to be the quality maintained by the chamber. The variation in the quality is supervised and regulated by the chamber. Similarly, in shelloc trade, which is carried on mostly in Mirzapur in U. P., the *sabha* keeps and maintains a standard sample of first and T. N. quality of shelloc. If at the time of delivery, the purchaser suspects that the defect in the first quality of shelloc is more than Re. 1/- per maund

Functions of the chambers.

I. To promote the interest of traders.

II. To supervise deliveries.

or in T. N. quality is more than Rs. 2/- per maund, he can apply to the Association for survey. The survey can also be applied for, if it is suspected that goods have been prepared from the bag of single cloth called "*ikehri theli ka mal*." Shelloc is prepared from lac. Lac seed is mixed with other chemicals, and put into a bag of double sheets of cloth, in order to give it the necessary amount of refinement. Some shop-keepers, with a view to make undue profit, use only single sheet in the bag and so the shelloc produced is of an inferior quality. This is the distinction between *ikehri* and *doheri theli ka mal*. The secretary on receipt of an application for testing and survey, sends for a sample of shelloc to be delivered from the seller's godown. This sample is kept in a bag sealed and signed by both the buyer and the seller. It is tested by the executive committee. If it thinks that the defect in the first quality shelloc is lower than Re. 1/- per maund or in T. N. quality Rs. 2/- per maund, the purchaser can reject the goods sought to be delivered. If the purchaser chooses to accept the same shelloc, he can have the *batta* (deduction in price on account of defect in quality), ascertained by the committee. The scale of *batta* is according to that prescribed by the Calcutta market. If the shelloc should be found to contain half per cent. of raisin, the *batta* is Rs. -/8/- per maund, and over it Rs. 2/- per half per cent. per maund. If the shelloc is found to contain dirt, an allowance is given upto 3 per cent. and over and above it at Re. 1/- per half per cent. per maund, till 4 per cent., and above that at Rs. 2/- per each half per cent. per maund. If the parties want, the testing is also done by an expert at Calcutta. Thus it would be seen that deterioration of quality is discouraged by the chambers.

III. To regulate
the transac-
tion of
business.

It regulates the conduct of business, and frames rules for purchases and sales, as well as the mode in which the delivery is to be given on the dates fixed for delivery. It also prescribes the names of the months of delivery for the transactions current in the market. For example, suppose the transactions of January delivery are running, the chamber would issue the next delivery month, say April or May. Nobody in the market can transact any business of the delivery of any other month. Thus uniformity and simplicity is secured in the market,

IV. To fix
charges.

It fixes the rates of the incidental charges, for instance, the rate of commission agents, brokers, charity charges, interest etc. These charges and rates differ from place

to place. By way of illustration, we tabulate below the charges that different sellers pay while disposing of wheat in the *Mandis* of Gaziabad and Hapur. Calculations are made for quantity of wheat costing Rs. 100/-. The charges differ for cultivator seller and *arhatia* seller who is an expert dealer.

Items.	Percentage charges in Rs.	Sellers arhtis share.	Purchaser's share.	Misc.
Cultivator seller (Ghaziabad)				
Octroi ...	-/8/-	...	...	-/8/-
Tulai ...	1/9/-	1/-/9	-/4/-	-/4/3
Charity ...	-/1/-	-/-/6	...	-/-/6
Dane ...	-/10/-	-/5/-	...	-/5/-
Extra weight ...	-/10/-	...	-/10/-	...
Bag Allowance ...	-/8/-	...	-/8/-	...
Karda (extra) ...	-/5/-	...	-/5/-	...
Total ...	4/3/-	1/6/3	1/11/-	1/1/9
Cultivator seller (Hapur)				
Tulai ...	1/4/-	1/4/-	...	...
Dane ...	-/10/-	...	-/10/-	...
Wages ...	-/2/6	...	...	-/2/6
Filling charges ...	-/-/6	...	...	-/-/6
Bag allowance ...	-/3/-	...	-/3/-	...
Karda (extra) ...	-/5/-	...	-/5/-	...
Total ...	2/9/-	1/4/-	1/2/-	-/3/-
Expert seller (Ghaziabad)				
Octroi ...	-/8/-	...	...	-/8/-
Tulai ...	1/9/-	1/-/9	...	-/8/3
Extra weight ...	-/10/-	...	-/10/-	...
Bag allowance ...	-/3/-	...	-/3/-	...
Total ...	2/14/	1/-/9	-/13/-	1/-/3
Expert seller (Hapur)				
Tulai ...	-/12/-	-/12/-	...	...
Dane ...	-/10/-	...	-/10/-	...
Wages ...	-/2/6	...	...	-/2/6
Filling charges ...	-/-/6	...	...	-/-/6
Bag allowance ...	-/3/-	...	-/3/-	...
Total ...	1/12/-	-/12/-	-/13/-	-/3/-

The amount of these charges may vary from time to time, but the items of expenses remain invariable. They have become almost fixed by the force of the usages of those *Mandis*

V. To keep schedule of prevailing prices.

The chambers keep a regular record of rates prevailing in the market from day to day. If a dispute arises as to what the rate on a particular day was and whether the market had a tendency to rise or fall, it can be easily ascertained by a reference to the chart of the prices. The question becomes important when the *arhatia* closes the transaction before the due date, and later on the constituent disputes the discretion of the *arhatia* and claims damages. The tendency of the market gives an inkling into the working of the mind of the parties. The record of the prevailing rates not only determines the movement of prices but also helps in the assessment of damages.

VI. To keep deposits of margin and cover money.

In some of the chambers, the business transacted between its members is carried on through the chamber. The chamber accepts deposits from the members as security for the settlement of business transactions. The main object of compelling the members to deposit the securities is to avoid litigation between the members. In the wheat chambers at Muzaffarnagar, a *sai* or advance deposit of Rs. 50/- or Rs. 25/- is taken for every *bijak* (a *bijak* is equal to 200 mds. of wheat). With every variation in price by two annas per maund, an additional deposit of Rs. 25/- per *bijak* is called for. Similarly, refund is also made when prices vary in favour of the person doing the transaction. All transactions done between the members are recorded in the chamber. In fact, all the transactions between the members have to be done through the chamber. Thus at the time of the settlement, the profits or losses can be easily found out and if the party shirks or delays in payment, the claim can be paid up from the deposit standing in his name in the chamber.

Besides, this system also affords very good evidence of the transactions entered into. Private *bahis* might be incorrect or forged, but it is not possible in the case of the account books of the chamber, as it is meant for the cumulative security of all the members. If the private *bahis* tally with the entries of the *bahis* of the chamber, the entries in the private *bahis* too should be deemed to be correct. Thus the chances of fraud, mistake and negligence are greatly minimized.

Defects of the system.

The system, however, has its own defects.

(a) It very often happens that a member buys and sells at the same time. It is very difficult to find out whether these transactions cross each other or are independent sales and purchases. The chambers very often allow only the deposits to be kept for the balance of the transactions outstanding in the name of a particular member, and thus relieve him of much financial strain. If the sales and purchases should be cross transactions, the deposit for only the outstanding *bijaks* would suffice. If that is not the case, but the sales and purchases are independent transactions, the object of the rule is lost, and there is likely to be difficulty at the time of settlement.

(b) Generally all the *arhatias* in the market are the members of the chambers governing that market. They deal between themselves only. If an outsider wants to do business in that market he must come through one of the *arhatias*. It very often happens that the *arhatia*, instead of purchasing *bijaks* in the open market for his constituent, sells his own *bijaks* and *vice versa*. The transactions recorded in the chamber are those which take place between the members. Such transactions which take place between a member and an outsider are not recorded. The Chamber maintains a record of the transactions to minimise the chances of fraud, false entries in private *Bahis* and difficulties of proof in litigation. So the system safeguards only the members and not the constituents.

(c) It also happens that the *arhatia*, having received orders of purchases and sales from different constituents, crosses the transactions in his own *Bahis* and constitutes himself as risk taker in the middle. Such transactions are not recorded in the chamber. The *Sai* and *Chuk* recovered from the constituents are not deposited in the chamber. The outsiders, therefore, can get into trouble in the settlement of disputes and payment of the dues by the *arhatia*. The system affords greater facility to the *arhatia* at the cost of the constituent.

(d) From the record of the chamber it does not appear whether a particular transaction standing in the name of the *arhatia*, is his private business or is the *Sauda* of the constituent. It is correct that contract forms are usually filled in and exchanged between the *arhatia* and the constituent but where the constituent is illiterate and resides far away or is not strict about getting the contract forms, the contract remains oral. In such a case a dishonest *arhatia* can easily turn round against the constituent

Advocate High Court

Jammu & Kashmir

Srinagar.

and allocate his constituent's *Sauda* for himself should it be to his advantage.

(e) The system provides a safeguard only against the rise and fall of the market. If the sellers want to give delivery on the due date, or the purchasers call for delivery and the opposite party refuses to do so, the party refusing has to settle the transactions according to the price dictated by the opposite party or the current price determined by the committee of the chamber. Sometimes, a big speculator commanding huge financial resources, when placed in adverse circumstances, threatens to offer large quantities of goods for delivery or calls for similar deliveries. This practice is called *khyala*. Persons of inadequate financial position cannot provide so much money and cannot run such great risks. The forward transactions done are far out of proportion to the existing stock in the market. The big speculator buys up major portion of the store of goods available in the local market, and thereby puts his smaller adversaries in dis-advantageous position. The result is that the price is subject to artificial fluctuations. The smaller speculators, therefore, have to submit to the terms of the big firms dealing in speculation. Chambers do not provide any safeguard against such practices.

VII. To decide
commercial
disputes by
arbitration.

ARBITRATION TRIBUNALS.

Traders in India always prefer arbitration in respect of their disputes, for the disputes are settled expeditiously and economically. The Indian Arbitration Act was enacted to provide for arbitration by agreement without the intervention of the court of justice. But it only applies to Presidency towns, and to Rangoon, Karachi, Delhi, Cawnpore, Amritsar, Tuticorin and Lahore. The agreements about arbitration, in other places, are still governed by Schedule II of the Civil Procedure Code supplemented by sec. 28 of the Contract Act and sec. 21 of the Specific Relief Act. These provisions are found ineffective and contracts are entered into, incorporating certain features of the Arbitration Act. Thus some advantage of the Arbitration Act is attempted to be secured indirectly. The Bengal Chamber of Commerce, the Upper India Chamber of Commerce at Cawnpore, the Bombay Chamber of Commerce, the Karachi Chamber of Commerce, and the Chamber of Commerce at Delhi have their own arbitration tribunals and have framed rules in keeping with the Indian Arbitration Act. The smaller chambers, too, have tried to set up arbitration boards, and have framed

rules for the conduct of arbitration proceedings. Members of these chambers enter into contracts with a condition that all future disputes, arising between the parties, shall be decided by arbitrators selected in accordance with the mode prescribed by the chamber. By way of illustration, a rule from Sri Jain Sanatan Sikh Chamber at Muzaffarnagar is quoted below. Some of the other chambers have also similar rules.

"All questions and disputes, arising out of, or in relation to, contracts made subject to these byelaws, shall be referred to the arbitration of two dis-interested members or nominated representatives, one to be chosen by each disputant, such arbitrators having the power to call in a third arbitrator who must also be a member or an authorized or nominated representative of a member.

The award made by such arbitrators or by any two of them shall be final, and binding on both the parties, subject only to the right of appeal to the Board within 10 days of the said award on payment of Rs. 25/-. Should one of the disputing parties appoint an arbitrator, and the other refuse or neglect to do so for 24 hours in Muzaffarnagar, or 72 hours in India, after receipt of notice in writing of the appointment, the question in dispute shall, upon application of either of the disputing parties, stand referred to two arbitrators to be nominated by the Chairman of the Board."

This rule is based on the pattern of the rules of The East India Cotton Association. By this plan of giving effect to certain features of the Arbitration Act by a special kind of contract, a number of legal questions arise. It is interesting first of all to examine the provisions provided for arbitration without reference through court, and then to see how the scope of these provisions has been widened.

Rule 17 of schedule II of the Civil procedure Code runs as follows:—

"Where any persons agree in writing that any difference between them shall be referred to arbitration, parties to the agreement or any one of them, may apply to any court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court."

"The application shall be in writing. After enquiry the court shall order the agreement to be filed and shall make an order of reference to the arbitrator, appointed in accordance with the provisions of the agreement, or if there be no such provision, and the parties cannot agree, the court may appoint an arbitrator."

Rule 20 runs as follows:—

"Where any matter has been referred to arbitration without the intervention of a court, and an award has been made

thereon, any person interested in the award may apply to any court having jurisdiction over the subject-matter of the award that the award be filed in court."

"The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. The court shall direct notice to be given to parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed."

Rule 21 runs as follows:—

"Where the court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the court shall order the award to be filed and shall proceed to judgment according to the award.

Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award."

Under section 28 of the Contract Act agreements in restraint of legal proceedings are void but exception 1 provides:—

"This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. When such a contract has been made, a suit may be brought for its specific performance, and if a suit other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit."

Exception 2 provides:—

"Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration."

Proviso to section 21 of the Specific Relief Act runs as follows:—

"And, save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person who has made such a contract, and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

It must be borne in mind that the second paragraph of exception 1 of section 38 is still in force in scheduled

districts (Act No. XIV of 1874), but, in the rest of British India, stands repealed by the proviso to section 21 of the Specific Relief Act, which does not extend to scheduled districts.

The last 37 words of the proviso to section 21 of the Specific Relief Act do not apply to any agreement to refer to arbitration or to any award to which Schedule II of the Civil Procedure Code applies (see Schedule II para 22 of the C. P. C.) nor to those governed by Indian Arbitration Act, Section 3.

A passage from *Din Bandhu Vs, Durga*¹ may usefully be reproduced to show the effect of these changes.

"Section 28 of the Indian Contract Act, 1872, invalidated agreements in restraint of legal proceedings for the enforcement of rights in the ordinary tribunals. The first exception, however, saved contracts to refer to arbitration future disputes between the parties; it further provided that suits might be brought for specific performance of such agreements, and the existence of the agreements might be pleaded as a bar to suits instituted in contravention thereof. The second exception saved contracts to refer questions that have already arisen. The second clause of the first exception was repealed by the Specific Relief Act, 1877; section 21 barred suits for specific performance of such arbitration agreements, but preserved the right to set them up as a bar to suits brought in defiance thereof. The Indian Arbitration Act, 1899, which has a restricted application, excluded by section 3 the operation of the last 37 words of section 21 of the Specific Relief Act and by section 19 conferred on the Court power to stay proceedings where there was a submission. The Civil Procedure Code, 1908 was, in respect of the matter now before us, modelled on the provisions of the Indian Arbitration Act, 1899; paragraph 22 corresponds to section 3 and paragraph 18 to section 19. The result of these legislative enactments is to bring the law here substantially in conformity with the law in England. The successive stages of the development of that law are indicated by *Waughan Williams L. J. and Fletcher Moulton L. J. in Doleman Vs. Ossett Corpn* (1912) 3 K. B. 257. See also *Appavu Vs. Seeni* (41 M. 115). The latter portion of the proviso to section 21 of the Specific Relief Act, adopts the English Statutory rule enacted in Section 11 of the Common Law Procedure Act of 1854 (17 and 18 Vict. Chap 125). The object of the Legislature was to enable effect to be given to the arbitration agreement before the action was tried and this was achieved by the provision that the action might be stayed by the order of a judge made in the exercise of his judicial discretion. This was reproduced in section 4 of the English Arbitration Act of 1889 (52 and 53 Vict. Chap. 49) under which every Court has power under certain circumstances to stay proceedings in actions in respect of any matters agreed to be referred to arbitration. This provision was adopted for cases governed by the Indian Arbitration Act, 1899 in Section 19 of

1. 46 Cal. 1053:51 I. C. 80.

that Act and has now been introduced in paragraph 18, Schedule II of the present Code of Civil Procedure (Act No. V 1908). Section 89 (1) of the present Code of Civil Procedure provides as follows—Save in so far as in otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force all references to arbitration whether by an order in a suit or otherwise and all proceedings thereunder shall be governed by the provisions contained in the second schedule. Section 22 of the Schedule provides that the last 37 words of section 21 of the Specific Relief Act 1877 shall not apply to any agreement to refer to arbitration or to any award to which the provisions of Schedule II apply. Though the Courts will refuse to enforce specific performance of agreements to refer to arbitration it being impossible to compel a person to select an arbitrator, an inequitable refusal of a plaintiff to make such a reference may disentitle him to the aid of the Court on the principle that he who seeks equity must do equity."

The interpretation put upon these sections by courts has further widened their scope on various questions which arise in connection with arbitration, to suit the requirements of the present conditions.

REFERENCE OF FUTURE DISPUTES TO ARBITRATION.

Futura disputes.

There is a lot of controversy about the reference to future disputes to arbitration. Under the code of Civil Procedure of 1882, it was generally believed that it did not apply to future differences but only to disputes which had arisen at the time of the agreement to refer. It was for the first time held by the Bombay High Court¹ that section 523 of the Civil Procedure Code (of 1882) includes also reference of future disputes to arbitration. It was a Full Bench case consisting of Farron C. J., and Tyabji and Starling JJ., in which Farron C. J., observed as follows:—

"We are unable to accede to the contention of the Advocate General that section 523 C. P. C. is confined to cases in which a dispute actually existing at the date of the agreement is agreed to be referred to arbitration. The section doubtless does not contemplate an agreement to refer future differences being filed until differences have actually arisen.....It appears, however, that when a difference has arisen it is immaterial whether an agreement to refer is contained in a previously existing contract between the parties or whether it is an agreement entered into for the purpose of determining the existing dispute. Each equally falls within the scope of the section. The words "any difference" embrace alike we think, any present difference and any future difference arising out of the contract. It is, however, not necessary for us actually to decide this point, as we think that the second objection raised by the Advocate General must prevail."

The application was dismissed, for the arbitrator

1. *Fazullhoy Mehrali Chinoy vs. The Bombay & Persia Steam Navigation Co. Ltd.* I. L. R. 20 Bom. 232 F. B.

was not named in the reference. Tyabji J., concurred. Starling J., agreed that the section also includes future disputes but he gave no judgment about it as he was in doubt. Thus the judgments on this point are only *obiter dicta*. All the same this ruling is important.

In 12 Indian Cases page 639 the Judicial Commissioners Court at Sindh held that the dispute should be present and not future under Schedule II C. P. C. A similar view was held by the Allahabad High Court in Kunwar Puran Singh Vs. Bahal Kunwar.¹ It was held that all disputes should be set forth in the reference in the form of issues, and Schedule II did not apply to future disputes. This was, however, a case under Para 1 of Schedule II. The distinction about the facts of this case was pointed out by the Lahore High Court in Ganga Ram Vs. Ram Kishan Singh,² where it was held that there was nothing illegal to refer future disputes to arbitration as is clear from exception 1 to section 28 of the Contract Act. The Allahabad ruling, cited above was held not to be in point being a case under para. 1 Schedule II. It was said that, under paras 20 and 21 of Schedule II all that is required is that there should be a reference and an award. The same view was held in a Calcutta Case³ that an agreement to refer future disputes to arbitration is valid coming under section 28 exception 1 of the Contract Act. This ruling was based on English Law which is identical. The facts of this case were that the Manager of a company and its conductor made a contract that the conductor shall make certain deposits for the discharge of his duties and that the Manager of the Company shall be the sole judge and his certificate shall be conclusive evidence regarding any breach of rule, and the amount of security the company was entitled to detain. A similar contract was made in London Tramway Company Vs. Bailey.⁴ The terms were held to be valid.

In mercantile contracts there is hardly any dispute at the time of the agreement, the agreement is always to refer future disputes to arbitration. The current trend of interpretation is that where the reference is made under para. 1 of Schedule II in a pending case through court, the

1. 1930 All. A. I. R. 319.

2. A. I. R. 1932 Lah. 459 also see (Firm) Ram Dhan Das Ramji Das vs. (Firm) Shankar Das Devi Dayal A. I. R. 1936 Lah. 492: 164 I. C. 296.

3. Aghor Nath Banerji vs. The Calcutta Tramway Co. 11 Cal. 233 (F. B.)

4. L. R. 3. Q. B. D. 217.

points of dispute should be enumerated in the reference, but, where the agreement to refer is made outside the court, even future disputes can be referred to arbitration. This has enabled the merchants to refer future disputes even in those areas to which the Arbitration Act is not applicable.

It should be remembered that the matter in dispute must be one which has actually arisen at the time of the reference though it need not have arisen at the time of the agreement to refer the future dispute to arbitration.¹ This brings us to the question as to what is a matter in dispute which can be referred to arbitration.

MATTER IN DISPUTE.

Matter in dispute

Where there is a clause of arbitration contained in the contract, and the customer does not pay the money, the trader entitled to the money usually files a case before the arbitrators chosen in accordance with the contract. An important question that arises is whether the arbitrator has jurisdiction only to decide a matter in controversy, or can usurp the functions of a court of Law to decree or dismiss a claim just as it happens in *ex parte* cases. In Hallsbury's Laws of England Vol. I Para 945 at page 444, it is laid down that the subject matter of every dispute to arbitration by consent outside the court must be some difference or dispute arising between the parties. The same view has been held by the courts in India. The existence of a dispute is essential for arbitration and the dispute should be a real one. A dispute implies an assertion of a right by one party and its repudiation by the other.² Where there is no such dispute there can be no reference to arbitration.³ With this principle in mind, the next important question is whether mere failure to pay does amount to a difference which can be referred to arbitration. On this point the opinion is divided. In a recent Bombay case,⁴ after a discussion of the English Law and the rulings of the Indian High Courts, it was held that the existence of a difference or dispute is essential for the arbitrators' jurisdiction. P called upon D to pay a certain amount and to render accounts. D refused to pay but applied

1. Dawoodbhai Abdul Kader vs. Abdul Kader Ismailji A. I. R. 1931 Bom. 164.

2. Daud Bhai Abdul Qadir vs. Abdur Qadir Ismailji A. I. R. 1931 Bom. 164; Uttam Chand Salig Ram vs. Jewa Mamooji (1919) 46 Cal. 534:54 I. C. 285.

3. Chandmull Ganeshmull vs. Nippon Mulukwa Kahushiki Kaisha 64 I. C. 798.

4. A. I. R. 1931 Bom. 164 supra; Firm of Poker Das Kishin Das vs. Firm of Vidinji Gordhan Das 56 I. C. 514 (Sind).

for arbitration. It was held that mere failure to pay was not necessarily a difference, and the mere fact that a party could not or would not pay does not by itself amount to a dispute, unless the party who chooses not to pay raises a point of controversy, for instance, the basis of payment or time or amount of payment. This was a case under para, 1 of Schedule II of the Civil Procedure Code, and it was held that there was no controversy for the arbitrators to decide. It has been held that "matter in dispute" in para, 20 means the same as in para. 1 Schedule II of Civil Procedure Code. Under the Arbitration Act, future disputes can be referred to arbitration, but under Schedule II the dispute should be existing at the time of reference.¹ The same view was held by the Calcutta High Court.² Where the arbitrator was withholding payment under a claim of right to do so, there was a dispute between the parties and this gave arbitrators jurisdiction to decide. The Sindh court in 1921 held that under para 20 of Schedule II judge should not allow award to be filed unless some dispute existed.³ In 1934 the same court held that under para 1 of Schedule II mere failure to pay constitutes a difference between the parties to a submission.⁴ In 1935 the view was slightly modified,⁵ and it was held that mere failure or refusal to pay on demand any amount admitted to be due may be a dispute, but where no demand was made it cannot be held that there was a dispute about that item. The Lahore High Court⁶ held that all that paras 20 and 21 of Schedule II require is that the court should be satisfied that a matter was actually referred to arbitration and an award made thereon. It is not necessary that there should be dispute between the parties.

On a consideration of all the above rulings, the view of the Bombay High Court seems preferable. It is a cardinal principle of law that the powers given to a court by the statute can be taken away only by statute. It is not within the competence of private parties to confer or take away the jurisdiction of any court by private contract.

1. *Dip Chand vs. Sahib Dino* (1911) 12 I. C. 639 (Sind).

2. *Uttam Chand vs. Mahmud* 54 I. C. 285 also see *Mohomed Haji Hamad vs. Pirojshaw R. Vakharia & Co.* A. I. R. 1932 Bom. 341.

3. *Jamnumal vs. Gurdinomal* A. I. R. 1921 Sind 61.

4. *Tyebally Abdul Hussain vs. Messrs James Finlay & Co.* A. I. R. 1934 Sind. 105 at 116.

5. *Firm of R. B. Brijlal Jagannath vs. Firm of Allah Ditta Mahboob Ilahi* A. I. R. 1925 Sind. 242.

6. *Ganga Ram vs. Ram Kishan Singh* A. I. R. 1932 Lah. 459 : 137 I. C. 807.

The law provides scope for arbitration in Sch. II of Civil Procedure Code and the Arbitration Act. Under both these provisions the existence of a matter in dispute is essential to confer jurisdiction on the arbitrators to decide. The matter in dispute cannot be so interpreted as to completely take away from the court the powers to go behind the award. Where no demand for payment is made from a party or, where the amount to be paid is settled and the party liable merely refuses to pay without basing his refusal on some substantial dispute as to right, time or mode of payment, it can hardly be said that any matter in dispute existed. It is the function of a court to enforce a claim even where no controversy exists between the parties. To give this power to an arbitration board is to go beyond the scope of the provisions laid down for arbitration. Nobody can contract himself out of the statute, and therefore I think that the Bombay High Court has taken a correct view of the law. The convenience of the parties has no doubt to be considered, but it should not violate the spirit of the law. The courts should, therefore, go behind the award to see whether any matter in difference existed at the time of the difference. If there was no such difference, the court should refuse permission to file the award under Para 20 of Sch. II C. P. C.

Another feature of the commercial contracts having a clause of arbitration is not to name the arbitrator in the contract, but to prescribe a mode for his selection. The question is whether a reference to an un-named arbitrator is valid.

REFERENCE TO AN UN-NAMED ARBITRATOR.

Un-named
arbitrator.

Para. 17 (4) of Sch. II of Civil Procedure Code runs as follows:—

“Where no sufficient cause is shown, the court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement, or if there is no such provision and the parties cannot agree, the court may appoint an arbitrator.”

Para. 17 corresponds to the old section 523 C. P. C. Under the old code two difficulties were felt, namely, (1) the reference of future disputes could not be made and (2) reference to an un-named arbitrator was not possible. The first difficulty was solved by a Full Bench ruling of the Bombay High Court¹ and for the second difficulty the

1. Fazulbhoy Mehr Ali Chinoy vs. The Bombay & Persia Steam Navigation Co. Ltd. 20 Bom. 232.

section was so amended as to make the reference to unnamed arbitrators possible. In a Sindh case¹ the agreement was as follows:—

“In the event of the purchaser failing to nominate an arbitrator within 7 days after he shall have been requested to do so by the Macdonald Company, the dispute shall be referred to two arbitrators nominated by Messrs. Macdonald & Co. and the decision shall be binding on the parties. It was held that the reference was complete when the two arbitrators were nominated, and the appointment was complete when the reference was drawn up and the arbitrators accepted it.”

This was a case under the Arbitration Act, but now Sch. II C. P. C. has been brought in accordance with the Arbitration Act in these respects. Para. 17 Sch. II does not require that the arbitrators should necessarily be named in the agreement. The procedure laid down in the contract should be followed.²

In a commercial contract with an arbitration clause, when the opposite party does not co-operate in the appointment of and enquiry by the arbitrators, the other party gets the arbitrators nominated or appointed in accordance with the agreement and tries to get the award filed in court under para. 20 of C. P. C. In such cases the question arises whether a party can privately secure an award and have recourse to para. 20 Schedule II C. P. C., or he should have the agreement filed under para. 17 of the Schedule II and have the reference made through court. In other words, can an award, be filed under para. 20 without having recourse to para 17 of Schedule II C. P. C.?

SCOPE OF PARAS. 17 AND 20 SCHEDULE II C. P. C.

The scope of para. 17 was pointed out in an Allahabad case³ thus:—

“The scope of para 17 is no more than this that where an agreement of reference to arbitration has been entered into by the parties, but the arbitrators have not so far functioned, the court has power to enforce the agreement against the parties where the arbitrators are willing to act in terms of the reference.”

In a Lahore case⁴ when application under para. 17 was filed, the arbitrators had not entered upon arbitration, but before the application could be disposed of they had delivered their award, it was held that the object of para. 17

1. Macdonald Co. vs. Nar Singh Dass Pokhar Dass, A. I. R. 1927 Sindh 136.

2. Charles Louis Draffens vs. Gurditta Mal 9. I. C. 655.

3. Shiv Narain vs. Bala Rao 1932 A. L. J. 331.

4. Mst. Parvati vs. Durga Devi A. I. R. 1928 Lah. 170:108 I. C. 186 following 12 M. I. A. 112 and 29 All. 13.

Scope of paras.
17 and 20.

was completed though not through the agency of the court and proceedings should have started under para. 20. Having once given the award, the arbitrators had become *functus officio* and a second award could not be given without fresh agreement. In a pending suit, the authority of the arbitrators is derived from the order of the court, while in a private arbitration it is the agreement which confers jurisdiction. Para. 17 is only a machinery for the tribunal of arbitrators to be made to function.

Enforcement of
award in illegal
contracts.
Arbitration in
illegal contracts.

Although ordinarily when an award is made, the court need not go to find out the causes vitiating the award, except those mentioned in Schedule II; yet when the contract is itself void, the arbitration clause, which is a part of the contract, is also void and unenforceable. An arbitration clause in a wagering contract is void.¹ Similarly, where a dispute in regard to money obtained by bribes taken dishonestly from the public is referred to an arbitrator and an award is made, the award cannot be filed in court, nor can a decree be passed thereon².

It very often happens that the agreement is signed either by the *Munib* of the firm, or by one of the partners. In such cases the question arises whether the entire firm is bound by the contract or not. This lands us into the discussion as to who is competent to enter into the contract of arbitration.

PERSONS WHO CAN ENTER INTO THE CONTRACT OF ARBITRATION.

Munib.

The *Munib* of a firm occupies an anomalous position in the business circle. He is sometimes only a book-keeper, and sometimes the cashier, while at others, he is the sole manager of the firm. Thus the scope of the authority of a *Munib* is a question of fact which has to be determined by the court. If he has been authorised by the firm to sign the agreement of arbitration on behalf of the firm, the contract is valid. The authority given by the firm may be express or implied. In the case of implied authority, the usual business transacted by the *Munib*, the conduct of the partners prior and subsequent to the agreement, and the fact whether the agreement to refer to arbitration has been acted upon by the firm, are relevant circumstances.

1. Karuna Kumar Datta Gupta vs. Lankaram Patwari A. I. R. 1933 Cal. 759.

2. Piarey Lal vs. Mahesh Chandra A. I. R. 1934 All. 493 : 1934 A. L. J. 1256 : 149 I. C. 396.

In the case of one partner signing the agreement of arbitration, two cases can arise. The firm may be an ordinary partnership firm, or it may be a joint family firm.

In the case of an ordinary partnership firm, it has been held that one partner cannot enter into an agreement to refer to arbitration without the authority of the other partners.¹ An Allahabad case² had gone even further. It was said that O. 30, R. 1 does not empower one partner to refer the case to arbitration so as to bind others, though the suit is against the firm as such. If there is no agreement of all the parties at the time of the reference, then a subsequent agreement cannot make the reference itself valid though under certain circumstances it may amount to estoppel. This was, however, a case under para. 1 Schedule II where all the parties should join in the reference. In the other case the proposition that one partner has no authority to refer the dispute to arbitration, has been modified. In a Sindh case,³ it was held that one partner can enter into arbitration, if it is necessary or usually done in course of business. European importing merchants do not deal with firms without arbitration clause. In such cases, the authority of a partner to refer to arbitration is presumed. Authority may be presumed from conduct; it may also be implied. Even if an act is done without authority, the same may be ratified.⁴

An ordinary partner.

In the case of a joint Hindu family firm, the Lahore High Court has held that a partner can not enter into an agreement on behalf of the firm to refer the dispute to arbitration.⁵ Even the manager of joint family can bind the coparceners only in the ordinary matters of business, but cannot refer to arbitration so as to bind others. In other cases it has been held that the *Karta* of a family has a right to refer to arbitration, and the junior coparceners would be bound by the contract.⁶ Similarly the natural guardian of a minor

Member of a joint Hindu family

1. Rajendra Prasad vs. Pannalal Champalal A. I. R. 1932 Cal. 343; Jaikaran Dass vs. Ram Chandra A. I. R. 1934 Lah. 483.

2. Gopal Das vs. Baij Nath A. I. R. 1926 All. 238.

3. Firm of Khalsa Brothers Agency vs. Hari Ram Sriram & Co. A. I. R. 1924 Sindh. 29.

4. Chandooru Punneyya vs. Venugopala Rice Factory 43 I. C. 507; A. H. Ghaznavi & Co. vs. Budge Budge Jute Mills. 25 I. C. 955; Thomas Bertram Shimwell vs. Baniram Gobindram 1 I. C. 937.

5. Diwan Chand vs. The Punjab National Bank Ltd. A. I. R. 1932 Lah. 291.

6. Raja Ram vs. Gopi Nath A. I. R. 1937 All. 721; 133 I. C. 416; Ram Bilas Singh vs. Brij Singh A. I. R. 1932 Pat. 60; 135 I. C. 518.

can agree to arbitration so as to bind the minor.¹ The necessity of the propriety of reference to arbitration has to be judged with due regard to the circumstances as they existed at the time when the reference was made, and not with reference to subsequent events. If the guardian acted in the best interests of the minor, the award is binding on the minor.² The fact, that one of the parties to the reference to arbitration is minor, is no ground for holding that he is not bound by the award. When he is represented in the arbitration proceedings by his father, he cannot repudiate them or the award following thereon.³

Conflict of jurisdiction.

Where there is a contract with arbitration clause, and if one of the parties tries to refer the matter in dispute to arbitration, the other party usually as a counter attack files a regular suit in court and vice versa. In such cases, a conflict of jurisdiction arises and the question crops up as to which of the proceedings should be stayed. The principle has been laid in the leading case on this point *Doleman & Sons Vs. Orsett Corporation*,⁴ and it has been followed by the High Courts in India. Molten L. J., remarked in *Doleman's* case as follows:—

“The law will not enforce the specific performance of an agreement to refer to arbitration, but if duly appealed to, it has the discretion to refuse to a party the alternative of having the dispute settled by a court of Law, and thus to leave him in the position of having no other remedy than to proceed with arbitration. If the court has refused to stay an action, or if the defendant has abstained from asking it to do so, the court has seisin of the dispute and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows that, in the latter case, the private tribunal, if it has ever come into existence, is *functus officio* unless the parties agree *de novo* that the dispute shall be tried by arbitration and that the action itself shall be referred. There cannot be two tribunals, each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision.”

In India, the law is incorporated in para. 18 of the Schedule II of the Civil Procedure Code which is based on section 19 of the Indian Arbitration Act and the latter has been enacted on the lines of section 4 of the English Arbitration Act 1889. Para. 18 Schedule II runs as follows:—

1. *Ram Autar Singh vs. Langat Singh* A. I. R. 1931 Pat. 92:130 I. C. 810.

2. *Mohan Singh vs. Mst. Gur Devi* A. I. R. 1931 Lah. 728:131 I. C. 738.

3. *Tulsi Ram vs. Jhanak Lal* A. I. R. 1936 Nag. 197:165 I. C. 556.

4. (1912) 3 K. B. 257.

"Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit."

In order to invoke the aid of this doctrine the following conditions must be fulfilled.

1. The person instituting the suit must be a party to the agreement to refer.
2. The party wishing to stay the suit must have the right to apply to the court to stay it.
3. The application should be made at the earliest stage of the suit.
4. The subject matter of the dispute before the arbitrator and the court must be the same.¹
5. There should be no reason why the matter should not be referred to arbitration in accordance with the agreement.

The court has a discretion under this paragraph to stay a suit instituted by one party to a submission against the other party. The court will, however, ordinarily exercise the discretion in favour of the stay.²

Lord Selbourne in *Willesford Vs. Watson*³ remarked:—

"If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then, since that Act of Parliament, (that is, the Common Law Procedure Act, 1854, S. 11, which corresponds to Para. 18 of the Civil Procedure Code) was passed, a prima facie duty is cast upon the courts to act upon such an agreement."

Where one of the parties denies the agreement to refer, set up by the other party, it is within the province of the court to decide whether there is such an agreement.⁴

Where the arbitration clause does not cover the whole subject matter of the suit, the court will not split

Instances where stay has been refused.

1. *Firm Harjasrai Arjundass vs. Tek Chand* A. I. R. 1927 Lah. 465; *Jai Narayan Babulal vs. Narain Das Jaini-Mal* 1922 Lah. 369.

2. *Dinbandhu vs. Durga Prasad* 99 Cal. 479:51 I. C. 80.

3. (1873) 42 L. J. Ch. 447.

4. *Shiv Prasad vs. Indore Malva United Mills* 39 I. C. 508.

the suit into two parts, one to be tried by the court, and the other by the arbitrator. The court in such a case will refuse reference to arbitration.¹ If the main subject matter of the suit is within the contract of arbitration, the fact that small portion of the relief claimed is not within the scope of the agreement, is not sufficient reason for refusing the stay of the proceedings.² Where fraud is alleged, and the party charged with fraud desires a public enquiry, the court will refuse to refer the dispute to arbitration.³ If the court in a case comes to the conclusion that there was no valid submission, and that there was no contract regarding arbitration between the parties, it would in its discretionary powers refuse to stay the suit.⁴ If the arbitration clause becomes inoperative, for example due to the death or refusal of one of the arbitrators, the court has no power to stay the proceeding.⁵ If difficult questions of law are likely to arise in a case, such as would inevitably entail a special case being prepared and referred to the court by an arbitrator, the court may, in the exercise of its discretion, refuse the stay. So also, if the question of law would arise which is clearly outside the purview of the arbitration clause, and the other questions though within it, are so intimately connected with the prime question that a more convenient course would be to try the whole action in court, a stay may be refused.⁶

In order to obtain stay of the suit, the party should apply at an early stage of the suit, preferably before the issues. Where the same matter comes before both the tribunals—a public tribunal appointed by the Sovereign and a domestic forum chosen by the parties—and no order is made staying the proceedings either under S. 19 Arbitration Act, or under Para. 2 of Sch. II C. P. C., before the one or the other, the public tribunal alone must decide that matter and cannot be hampered by any adjudication made by the private tribunal. Neither can that adjudication be pleaded as a bar to the action, nor can it be allowed to affect the merits of the decision given by the public tribunal. Thus, the effect of the institution of the suit is that

1. Turnock vs. Sartoris (1890) 43 C. D. 150.

2. Singaran Coal Syndicate vs. Balmukand (1931) 58 Cal. 1107.

3. Russell vs. Russell (1880) 14 C. D. 471.

4. Regal Theatres Ltd. vs. Gur Charan Singh A. I. R. 1937 Lah. 206 : 39 P. L. R. 423.

5. Narayanappa vs. Ram Chandrappa 54 Mad. 469 A. I. R. 1931 Mad. 28 : 129 I. C. 638.

6. Singaran Coal Syndicate Ltd. vs. Balmukand Marwari 58 Cal. 1107 : 35 C. W. N. 514.

all proceedings before the arbitrators subsequent to the institution of the suit are invalid. But, if after the institution of the suit, a party still wishes to proceed with the arbitration, his remedy is to apply for stay, which the court will grant, unless there are weighty reasons to the contrary, leaving the parties to proceed with the arbitration from the stage at which the proceedings were on the date of the institution of the suit.¹

Apart from Schedule II, a regular suit may be brought to enforce the rights under the award.² In a Calcutta case, it³ has been held that a suit to enforce the terms of the award is in essence one for the specific performance of the award. The High Courts⁴ have differed, but the correct view seems to be that a suit to enforce an award is a suit for the specific performance of the award or not, would depend upon the nature and the purport of the award. Where the award directs the performance of a duty, or a condition which may be enforced under the Specific Relief Act, the suit may be one for specific performance of the award.⁵ But where the award settles or declares the title of the parties, and the claim is based on the title so created, it cannot be called a suit for the specific performance of the award, for instance a suit on a sale-deed is a suit for the specific performance of a contract of sale.⁶ Similarly, a suit for the recovery of money based on award is a money suit although the validity of the award may be contested.⁷

Regular suit to
enforce an award

The working of the chambers and examination of the rules of business framed by them form a subject by themselves but they are mostly of commercial and economic interest. As far as the legal aspect of the subject is concerned the arbitration forms the most important topic.

1. Jawahar Singh Sundra Singh vs. Fleming Shaw & Co. Ltd. A. I. R. 1937 Lah. 851.

2. Sec. 30 Specific Relief Act; Manian vs. Lala A. I. R. 1933 All. 748; Ratan Chand vs. Rup Lal Lah. 134; Jagdambya Debya vs. Bibhuti Bhushan Sarkar A. I. R. 1933 Cal 407.

3. 1918 Cal 899.

4. Sornavalli Ammal vs. Muthayya Sastrigal (1900) 23 Mad. 593; Sheo Narain vs. Beni Madho (1901) 23 All. 285.

5. Birjmohan Lal vs. Shiam Singh (1901) 24 All. 164; Bhajahari Saha Banikya vs. Behary Lal Basak (1906) 33 Cal. 881.

6. (1901) 23 All. 285; Govindlal Maneklal vs. Manek Chowk Spinning & Weaving Mills A. I. R. 1934. Bom. 140.

7. Nanalal Lallu Bhai vs. Chhotalal A. I. R. 1925 Bom. 519: 49 Bom. 693; Mizaji Lal vs. Partab Kunwar A. I. R. 1919 All. 12, 13: 42 All. 169; Thirumurthy Chetty vs. Ponnan Chetty A. I. R. 1924 Mad. 485; Simson vs. Me Master 13 Mad. 344 (346); Maungni vs. Maung Aung Ba. A. I. R. 1926 Rang. 198 (200): 4 Rang. 227; Bansidhar Mangat Rai vs. Dinanath & Co. A. I. R. 1929 Sindh. 43: 23 Sindh. L. R. 411; But see Ma Ala Gyi vs. Maung Seik Po A. I. R. 1924 Rang. 192: 1 Rang. 700; (1871) 3 N. W. P. H. C. R. 117 (118).

CHAPTER X.

USAGES OF PARTICULAR TRADES IN INDIA.

AGENT'S CUSTOM IN CALCUTTA.

Agent's custom
in Calcutta.

There is no custom in Calcutta by which a sale agent can charge his commission before he can bring about the sale contract.¹

BOMBAY SILVER MARKET.

Bombay Silver
Market

A custom of the Bombay Silver Market for forward contracts was that only *Sharrafs* were the ostensible buyers and sellers, though *Sharrafs* might have and often did have outside principals for whom they were acting. The *Sharrafs*, when acting for principal, worked some-times for *Kachchi Arhat* and some-times for *Pakki Arhat*. In the case of *Kachchi Arhat* the *Arhatia Sharraf* guaranteed the performance of the contract to the other *Sharraf* but did not guarantee its performance to his own principal. In the case of *Pakki Arhat*, the *Arhatia Sharraf* who then acted for a higher commission was liable as a principal both to his own employer and to the other *Sharraf*.²

BOUGHT AND SOLD NOTES IN CALCUTTA.

Bought and sold
notes in Calcutta

According to the custom prevailing amongst merchants in Calcutta, the contract should be by 'bought and sold notes.'³ The presumption should be in favour of the usage. Where, however, the bought and sold notes are falsified the contract should be inferred from other pieces of evidence.⁴

BROKER'S GALA.

Broker's gala.

Under the *Kachchi Arhat* System when an agent receives an order, he sends for a broker and settles the rate with him. The rate so settled becomes from that moment binding upon both the agent and the broker; and the broker remains personally bound till he brings a party willing to take up the contract. The broker in such a case adopts one of two ways. He either brings a party willing to take up and introduces him to the agent, and the party and the agent then exchange *Kabalas* with

1. Morde vs Cockerell 1 Foulton 209 (1835).
2. Abraham vs. Sarup Chand 42 Bom. 224.
3. John Cowie vs. William Remfrey 3 M. I. A. 448.
4. Durga Prasad vs. Bhajan Lal 8 C. W. N. 489 : 31 I. A. 122.

each other; or, when a broker has got a contract of his own ready, he agrees to transfer it to the agent and then brings together the agent and the other party of his (broker's) contract and the these two then exchange *Kabalas* with each other. If when the party is brought to the agent the market is the same as the rate settled by the agent with the broker, the broker gets nothing beyond his commission. If the rate is less than the rate originally settled by the broker, the difference between the two rates has to be borne by the broker and paid to the person with whom the original rate was settled. If, on the other hand, it is more, that person has to bear the difference and pay it to the broker. This payment of difference which is either against or in favour of the broker, according as the rate in the market is less or higher than the original rate, is called the *broker's gala*.¹

BROKERAGE IN METAL TRADE IN MIRZAPUR.

Commission agents charge commission at -/8/- p.c. and brokerage at -/6/9 p.c. from the sellers of utensils. Out of this -/3/- is paid to the broker. The figures however are liable to vary from time to time.

Brokerage in metal trade in Mirzapur.

CARRIERS: INSUFFICIENCY OF PACKING.

The defendants carriers between Hongkong and Bombay, by a condition annexed to their bill of lading, stipulated that they should not be responsible for damages to goods arising from insufficiency of package. The plaintiff shipped certain goods in the defendant's steamer in packages which, though in fact insufficient, were packages of the kind ordinarily used for the conveyance of such goods from Hongkong to Bombay. On their being landed in Bombay it was found that the packages were more or less broken, and that the contents were in some instances injured, and had to a small extent escaped from the packages. In an action for damages in respect of such injury it was held that the evidence of mercantile usage would be admissible to show that the words 'insufficiency of package' should not be taken in the ordinary sense, but as meaning insufficient according to a special custom of the China trade.²

Carriers.

CATTLE GRAZERS IN U. P.

Cattles are given to be brought up by the grazers on the condition that when they give birth to an offspring the

Cattle grazers in U. P.

1. Fakir Chand vs. Doobile Govind Ji 7 Bombay L. R. 213.

2. Peninsular and Oriental Steam Navigation Company vs. Manik Ji Nasarvanji Padsha 4 Bombay H. C. R. O. C. J. 169 page 179 (1867).

value of the cattle would be ascertained; half would go to the grazer and half to the owner of the cattle. Whosoever is prepared to pay the half price to the other gets the cattle and the other gets the money. This is called *Adha Batai system*. If, however, the contract be that the grazer would get only 1/3rd, the system would be called "*Tikur Batai*."

CHATTIES IN GARHWAL DIVISION.

Chatties in
Garhwal
Division.

In way side markets the *Banias* or provision dealers maintain a *Chatti* (living accomodation) on the top of their shops. The purchasers of the food stuffs are allowed to cook their food and pass their night in the *Chattis* in consideration of the purchases made from the provision dealer. No rent is charged for the *Chatti*. It is supposed to be included in the price of the food stuffs purchased. This practice is common throughout Garhwal and even in other parts of Kamaun division.

COTTON TRADE IN TUTICORIN.

Cotton trade in
Tuticorin.

According to the mercantile usages in the Cotton trade in Tuticorin, where a dealer delivers cotton to the owner of a cotton press, not in pursuance of any special contract, the property in the cotton vests in the owner of the cotton press who is bound to give the merchant in exchange cotton of the like quality and quantity. The transaction is not a sale but an agreement of exchange. Where, therefore, cotton thus delivered was accidentally destroyed by fire: held that the loss fell to the owner of the press.¹

COTTON SATTA IN BOMBAY.

Cotton Satta
in Bombay.

A person entered into a contract to deliver a certain quantity of cotton and having failed, sought to pay the price of the quantity not delivered fixed at the ordinary market rate. It was found that the transaction, though purporting to be an ordinary contract was in reality of the nature of speculation on the rise and fall of the cotton market and dealt with goods which had no real existence in the market; also that in such transactions it was customary for the prices to be settled by a skilled committee of merchants engaged in similar transactions. In this case the committee settled a higher rate than what actually prevailed in the market. It was held that in the absence of proof of fraud either in the inception or in the proceedings of the committee, the decision of the committee

1. Volkart Brothers vs. Vettivelu Nadan 11 Madras 459.

was binding on the parties. In order to take part in such speculation in cotton in Bombay, a Bombay merchant is required to employ as his agent, one of the *Khamgaon Sharrafs*, in whose hands the dealings are and to submit to the conditions governing the trade.¹

DIYA OR LAMP IN A KHATTI.

When *Khatti* is stored, the quantity and quality of the grain stored are written on an earthen pot called *Diya* and put into the *Khatti*. The *Khatti* is sold without the grain being taken out and measured. The description of weight given in *Diya* is presumed to be correct.

Diya or lamp in a Khatti.

EXCHANGE BANKS IN CALCUTTA.

It is the custom of the Exchange Banks in Calcutta at their option to grant buyers of Sterling Drafts extension after the due date on a penalty, namely, payment of interest for any period after the due date, or, to declare the contract cancelled in cases of default by the buyer.²

Exchange Banks in Calcutta.

KACHCHA AND PAKKA BIDDING BY AGENT.

An agent at an auction sale made a bid for certain goods which was not accepted at the time by the auctioneers, but was referred to the owners of the goods for approval and sanction, the agent agreeing to such reference. The conditions of sale contained no clause providing for such procedure. The auctioneers before receiving any intimation from the owners of the goods, received a letter from the principals of the agent bidding at the sale, repudiating the contracts on the ground that the agent had no authority to bid for goods on their behalf. In a suit by auctioneers for recovering the loss on resale of the goods, they set up a usage of trade, whereby it was alleged that the bidder at such a sale was not at liberty to withdraw his bid until a reasonable time had been allowed to the auctioneer to refer the bid to the owner of the goods. The only evidence given on the point was that of an assistant of the plaintiff's firm who said that "such an agreement had never been repudiated." The court held that the conditions of sale containing no clause to the effect of the usage claimed and there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law, there was no contract between the parties and therefore no suit would lie.³

Kachcha and Pakka bidding by agent.

1. Pestonji Jehangirji vs. The firm of Jai Singh Dass Hansraj 8 C. W. N. 57 (63) P. C. (1903).

2. S. Mahboob Ellahie vs. Cox & Co. 98 I. C. 732.

3. Mackenzie Lyall & Co. vs. Chumroo Singh 16 Calcutta 703.

METHOD OF EXAMINING JUTE BAILS AND ASCERTAINING DAMAGES.

Method of examining jute bails and ascertaining damages.

In order to find whether the average of a whole consignment of jute is below the guaranteed standard of quality, it is sufficient if only a small sample taken from different portions of the bulk is examined to form a judgment as to what the bulk is. It is not usual to examine the whole consignment for the purpose.

In a suit of damages for breach of warranty as to the quality of jute supplied, the method of ascertaining damages is established and recognized in the trade. The buyer is entitled to two annas per maund for a deficiency of 5 P. C. of 'hessian warp' (In *Boisogomoff* versus *Nahapiet Jute Co.* 6 annas per maund were allowed). It is not necessary for the buyer to show how he has dealt with the jute delivered to him and whether he has suffered any and what loss by reason of the jute being not upto the warranted standard.¹

NAYA NUGAR ARATH.

Naya Nagararath

There is a custom at Nayanugar according to which a merchant coming from any other district is only allowed to trade in the name and upon the credit of a Nayanugar firm. The actual dealings are effected by the stranger himself or by his broker, but in each transaction the name of Nayanugar arhatia is given and his name is entered as the principal in the transaction. Credit is given to him and the final settlement of the transaction is effected with him. He is known as the *Arathi* or agent. At the conclusion of such transaction a memorandum of it is sent to the *Arathi* by the person who makes use of his credit. The memorandum is called *Panri*. If in respect of any transaction the stranger does not deliver *Panri* to the *Arathi* or agent, the *Arathi* is still responsible for payment to any vendor or third party and the *Arathi* can sue the stranger who used his name for the recovery of any amount paid by him to the vendor.²

PAYMENT OF PRICE TO METAL TRADERS IN MIRZAPUR.

Payment of price to metal traders in Mirzapur.

There is a time limit of 1 of 2 months in which the *Arhatia* should pay the seller. If the seller wants ready money, interest at 12 % is deducted. It is known as "*Muddat*." The suppliers of raw metal or ingots, however, charge interest on goods sold to manufacturers on credit.

1. *Boisogomoff* vs. *Nahapiet Jute Co.* 29 Calcutta 323 (1902).
2. *Sameer Mal* vs. *Choga Lal* 6 I. A. 238 at page 242.

STOCK EXCHANGE BROKER.

Stock exchange broker.

A person who employs a broker on the stock exchange impliedly gives him authority to act in accordance with the rules therein established, though such principal may himself be ignorant of the rules.¹ The meaning of this rule is that in such cases the client agrees with his broker that the dealings between them are to be carried on under the rules of the stock exchange so far as they are applicable to outsiders and not under the rules which are applicable only to the domestic forum of the stock exchange.² There is no established usage under which the client of a broker on the stock exchange who has become a defaulter, and whose transactions have been closed at prices fixed by the Official Assignee, can claim the right to close at the price so fixed a transaction entered into for him by the broker with another member of the stock exchange.³

It is a familiar rule that a principal, who employs an agent to purchase goods for him in a particular market is to be taken to be cognizant of, and is bound by, the rules which regulate dealings therein, and the agent is entitled to be indemnified by his principal for all that he does in accordance with those rules. Thus where a broker entered into a contract for a customer, which was not completed by transfer before the presentation of a petition for winding up the company, and who, according to the rules and regulations of the stock exchange was compelled to pay the price of the shares to the person from whom he bought, it was held that the broker was entitled to recover back from his principal the money so paid.⁴

Usages of shellac trade as prevailing in Mirzapur and recognised by Chapra *Beopar Vardhani Sabha*:—

SURVEY AND TESTING OF THE QUALITY OF SHELLAC.

Shellac Trade.

If at the time of delivery the purchaser suspects that the defect in the first quality shellac is more than Re. 1/- per maund or in T. N. quality is more than Rs. 2/- per maund he can apply to the association for testing and survey. The survey can also be applied if it is suspected that the goods have been prepared from bags of single cloth *i. e.* "*Ekahari Thaili ka mal.*" The Association shall send

-
1. Sultan vs. Totham 10 A & E. 27 (1839).
 2. Levitt vs. Hamblet 2 K. B. 53 (1901).
 3. Levitt vs. Hamblet 2 K. B. 53 (1901).
 4. White head vs. Izad L. R. C. P. 228 page 239 (1867). Bayley vs. Wilkins 18 L. J. C. P. 273 (1849); Seth Sameer Mull vs. Choga Lall 5 Calcutta 421 (1879); 6 I. A. 238.

for a sample of $1\frac{1}{2}$ seers of shellac to be delivered from seller's godown. This sample is kept in a bag and it is sealed and signed by both the buyer and the seller. If the goods are found to be of inferior quality the seller either rejects the goods or accepts it on a *batta* (*i. e.* deduction in price on account of defect in quality). Generally two samples are taken to meet the contingency of the first being lost.

ALLOWANCE MADE AT THE TIME OF THE PURCHASE OF SHELLAC.

The buyer takes the samples for testing to be put in a separate bag. The purchaser provides his bags and men to weigh the goods and the seller gives *two chataks* per maund as *jhukti*.

PURCHASE OF LAC.

The purchaser gets

(a) a rebate of $-\frac{1}{2}$ /- per maund. This is meant to cover the brokerage to be paid by the purchaser. In most cases the purchaser pays less than $-\frac{1}{2}$ /- per maund to the broker.

(b) *Pad Ganeshi*: The purchaser gets in kind 10 or 12 *Dharas* per 100 maunds of lac purchased as *Pad Ganeshi*.

(c) The purchaser gets credit for interest for 12 days known as *Muddat* at 9 p. c.. This is deducted from the bill which the commission agent presents to the purchaser. The bill is known as *Purza* and is stamped.

In Calcutta and Singapur market no "*Pad*" is allowed but a deduction in weight is made varying from $2\frac{1}{2}$ to 15 % for *Kothi Dala* or dirt and twigs. There is however a method of purchasing lac where no deduction is made and it is called "As it is method."

BROKERAGE OF LAC AND SHELLAC.

A broker of lac gets $-\frac{1}{2}$ /- per maund. from purchaser of lac but the amount paid is generally less. He also gets $-\frac{1}{3}$ /- per maund from seller as "*Pad Ganeshi*," but the seller deducts from the amount of *Dalali* a discount at $12\frac{1}{2}$ % known as "*Chhut*". Also the broker gets one *Dhara* of lac per 100 maunds of the purchases from the seller.

Brokerage in shellac is paid by the seller at $-\frac{1}{4}$ /- per maund. The following deductions are made by him before payment of brokerage per 100 maunds. Brokerage

i. e. Rs. 25/- less Rs. 3/2/- for "*chhut*", Re. -/6/- *Ram Lila* Re, -/6/- *Gaushala*. Thus he gets a net brokerage of Rs. 21/2/- per 100 maund of shellac.

Note:—The figures are varied according to the necessity by the *sabha*.

TULAI SYSTEM IN U. P.

What is called *Tulai* or weighment in U. P. is called *Dhadwai* in C. P. The custom of *Dhadwai* is as follows:—

Tulai system in U. P.

"Owners of village establishing market, dedicating their own lands and rendering other services to promote the interest of the community, charge *Dhadwai* on commodity. Custom of *Dhadwai* is neither unreasonable nor opposed to public policy.¹"

In U. P. the zamindars appoint their own *Tola* or weighman and out of the weighment charges a portion goes as wages to the weighman and the rest to the zemindar, in whose land the market is held.

USAGE OF BOMBAY IMPORTER.

According to the custom of trade in Bombay, when a merchant requests or authorizes a firm to order and to buy and to send goods to him from Europe at a fixed price, net free godowns including duty, or free Bombay harbour and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. It does not make any difference that the firm receives commission or trade discount from the manufacturer either with or without the knowledge of the merchant.²

Usage of Bombay importer.

1. *Raji Dattaji Rao vs. Puranmal* A. I. R. 1927 Nagpur 89:98 I. C. 759 at pages 765:766.

2. *Paul Beier vs. Chota Lal* I. L. R. 30 Bombay page 1; 6 Bombay L. R. 948.

APPENDIX I.

USAGES OF PARTICULAR TRADES RECOGNIZED IN ENGLAND.

Agricultural
customs.

TO ALLOW PROPERTY ON LAND AFTER THE SALE OF THE CROPS.

Where crops are sold and paid for before bankruptcy but the produce is allowed to remain on the farm of the seller until it suits the convenience of the buyer to remove it, by the custom of the farmers, such produce does not pass to the assignee under the law of reputed ownership.¹

PROPERTY SOLD NOT FIT TO REMOVE—HAY.

Where hay bought was left on the farm of the seller for it was not fit to be removed, it was held that the property in the hay could not pass to the assignee of the seller on the ground of the reputed ownership.²

CATTLES.

Where cattles were purchased and the seller became bankrupt within a week of the sale, the cattles were left on the farm of the seller for the convenience of the purchaser. It was held in an action of trover against the assignees that it was customary to leave the cattles purchased on the farm of the seller and the property in the livestock could not pass to the assignee.³

BILL OF SALE.

A farmer gave the appellants a bill of sale for his cattles in his possession which were sold in a bankruptcy case against him on the ground that the farmer was agisting the cattles. It was held that it was customary to leave the cattles sold in the possession of the seller and the farmer was agisting them for the vendees.⁴

CUSTOM OF AGISTMENT.

H placed certain livestock on the land of W to be sold after some time. A part of the purchase money was to go to W. W became bankrupt and his trustee claimed the stock on the doctrine of the reputed ownership. It

1. *Re Terry, Ex parte Vilder* (1862) 7 L. T. 370; 5 Digest 804, 6874.

2. *Pennel vs. Fox* (1859) 1 F & F. 617, N. P. 5 Digest 788, 6754.

3. *Priestley vs. Pratt* (1867) L. R. 2 Ench: 101; 5 Digest 805; 6875.

4. *Re James, Ex parte Swansea Mercantile Bank Ltd.* (1907) 24 T. L. R. 15 C. A. 2 Digest 255, 367.

was held that the custom of agistment was notorious and therefore the doctrine of reputed ownership could not apply.¹

USAGE ABOUT COMMISSION.

The auctioneer employed to sell the property advertised by him is entitled to his full commission on the sale of the property even if the sale should not take place through his direct agency.²

Auctioneers.

USAGE ABOUT CHARGES.

There is no usage by which a company is liable to pay the charges of a measurer employed by an architect before the company approves of the plan, commences operations or instructs the architect.³

Architects.

An architect, who had made out the quantities on a building contract, which was not carried out, was allowed to recover from the employer on a custom known to the parties.⁴

LATITUDE OF DETERIORATION "AVERAGE TAINT."

In dealings of bacon, if warranty is given for 'prime signed' bacon, it is not permissible to frustrate this warranty by adducing evidence of a custom which allows bacon only to a certain degree tainted as 'prime signed' bacon, or which precludes the purchaser from all remedy in case the purchaser fails to discover the defect at an early date.⁵

Bacon Trade.

PROPERTY IN MALT.

A seller of malt, who intimated his ware-houseman to hold the goods on account of the purchaser, became bankrupt before the goods could be remeasured and removed from the ware-house. The ware-houseman, who had acknowledged having so held it, could not set up a defence against the purchaser's claim, that by the usage of trade property the malt sold could not pass to the buyer before it is remeasured.⁶

Barley and malt trade.

MEANING OF "SEED BARLEY."

The plaintiff sold some seed barley to the defendant as "seed barley" which ultimately turned out to be "barley bigg" a kind of barley unfit for malting purposes. In a

1. *Re Woodward, Ex parte, Huggins* (1886) 3 Morr, 75, 2 Digest 255, 366.
2. *Rainy vs. Vernon* (1840) 9 C & P, 559; 3 Digest 34, 251.
3. *Knox & Robb vs. Scottish Garden Subverb Co. Ltd.* (1913) S. C. 872; 7 Digest 448, 473.
4. *Moon vs. Witney Union Guardians* (1837) 3 Bing. N. C. 814; 7 Digest 450, 481.
5. *Tates vs. Pym* (1816) 6 Taunt 446, 39 Digest 465, 904.
6. *Stonard vs. Dunkin* (1809) 2 Camp. 344; 7 Digest 54, 595.

suit for damages it was held that the contract was satisfied if the barley sold was fit for sowing purposes and that very clear evidence was needed to show that "seed barley" meant "barley fit for malting."¹

PAYMENT AT THREE MONTHS DISCOUNT.

Bleachers.

According to usage at Nottingham, accounts are made out quarterly, the amount found due is payable three months after. The bleacher can either accept cash payment less discount at 5 % or draw a bill upon the debtor payable after three months. He has, however, the lien to retain all goods bleached till all previous accounts are paid.²

SALE ON "COMMISSION."

Book-sellers.

A book-seller, who keeps books and sells them on commission cannot be treated as reputed owner of the books and the property in them cannot pass to the assignee of the book-seller on his bankruptcy.³

EQUITABLE MORTGAGE OF BEAR AND CUSTOM TO ADD UP FURTHER CHARGES.

Brewers.

In 1858 a publican deposited the lease of his public house with the defendants, a firm of brewers to secure payment for £ 200 as well as future debts incurred upto £ 500. In 1865 the publican, signed to the plaintiffs, a firm of distillers, an agreement by which, the house was further to secure a sum of £ 120 due to the distillers. The notice of the second equitable mortgage was given to the brewers. After the date of this notice the publican became indebted to the brewers for further sums. The brewers set up a usage of trade by which they claimed to be entitled to add up this further sum to the amount secured by the deposit of the lease and the total amount was to have priority over distiller's charge: Held that the custom set up was bad for want of mutuality and defined limits.⁴

MEANING OF CIDER.

The word 'cider' in Devonshire meant price of the apples.⁵

MEANING OF TAPERING BRUSH.

Brush Trade.

A "Tapering Brush" is not one which is different

1. Carter vs. Crick (1859) 4 H. & N. 412:7 Digest 55, 599.
2. Plaice vs. Allcock (1866) 4 F. & F. 1074:17 Digest 54, 593.
3. Whitfield vs. Brand (1847) 16 M. & W. 282:16 L. J. Ex. 103:153 E. R. 1195:5 Digest 797, 6815.
4. Daun vs. City of London Brewery Co. (1869) L. R. 8 Eq. 155:38 L. J. Ch. 454:17 Digest 55, 597.
5. Studdy vs. Sanders (1826) 5 B. & C. 628:17 Digest 70, 717.

from a common brush in no other respect than that the bristles are made of unequal lengths.¹

TO TAKE OUT QUANTITIES: AUTHORITY OF ARCHITECT.

It is customary for an architect to employ a surveyer Builders to make out the bill of quantities and for the successful competitors to make his charge.²

LIABILITY OF ARCHITECT.

By the usage of building trade, the builder whose tender was accepted was liable to the surveyer for the charges due for the quantities, but if no tender is accepted, the building owner or the architect is liable for it.³

MEANING OF WEEKLY ACCOUNT.

The well known expression "Weekly Account" by usage of building trade meant, an account of the day work expended in each week on the additions and alterations and materials used there-in.⁴

CONSTRUCTION OF CONTRACT.

A builder contracted to build the front and back walls of a house for "3 shillings per superficial yard of work 9 inches thick and finding all materials, deducting all lights." In the execution of the contract, the cover part of the walls, to a certain height was of stone work two feet thick and the remaining portion was of brick work 14 inches thick. It was held that evidence to prove the usage of builders was admissible and that on the basis of the evidence, the proper construction of the contract was that brick work will be governed by the contract, but that the stone work, unless exceeding 2 feet in thickness, was to be paid on the basis of *quantum meruit*.⁵

POSSESSION OF PLANS AFTER THE EXECUTION OF WORK.

The plans prepared by an architect, in connection with his employment as such to carry out alterations in certain houses, cannot be with-held by him when the same are demanded by the owner. A custom to the contrary was held to be unreasonable.⁶

USAGE ABOUT QUANTITIES.

The quantities, however, made out by an architect,

-
1. R vs. Metcalf (1817) 2 Stark 249: 36 Digest 610, 750.
 2. Moon vs. Witney Union Guardians (1837) 3 Bing. N. C. 814: 7 Digest 448, 472.
 3. North vs. Bassett (1892) 1 Q. B. 333: 7 Digest 450, 485.
 4. Myers vs. Sarl (1860) 3 E. & E. 306: 30 L. J. Q. B. 9: 7 Digest 341, 47.
 5. Symards vs. Lloyd (1859) 6 C. B. N. S. 691; 7 Digest 334, 16.
 6. Gibbon vs. Peace (1905) 1 K. B. 810, 7 Digest 436, 417.

are recoverable by him, in the event of the building contract falling through. Such a custom was held to be reasonable and enforceable.¹

MEANING OF "POUND WEIGHT."

Butter Trad

The custom that a pound of butter in a particular market weighs 18 ounces is unreasonable.²

LIABILITY OF CONSIGNOR FOR CARRIAGE.

A carrier who by the usage of the butter trade, is to be paid for carriage of goods by the consignor, has no right to retain them against the consignee of other goods of the same sort sent by consignor.³

METHOD OF WEIGHING.

The paper bag is included in weighing commodity.⁴

USAGE AS TO GOODS DAMAGED BY CALICO PRINTERS IN PRINTING.

Calico Trad

The custom that a calico printer is bound to take goods damaged in printing is enforceable. The printer, however, gets title in the goods when the owner has exercised his option not to take the goods himself. The mere fact that the goods are damaged gives no right to the printer to sell the goods.⁵

PACKER'S RECEIPT.

Evidence is admissible to explain the ambiguous words in a packer's receipt.⁶

CARRIER'S RIGHT OF LIEN.

A usage favouring the right of lien of a carrier for his general balance is unreasonable. It may, however, be a part of the contract express or implied.⁷

Cloth trade.

There is usage in cloth trade about sending goods for inspection.⁸

Coach builders.

If purchaser of a carriage allows it to remain in the premises of the maker even after the payment of the price and the maker becomes insolvent, the assignee cannot take

-
1. *Landsdaune vs. Sanerville* (1862) 3 F. & F. 236, 7 Digest 450, 482.
 2. *Noble vs. Durrel* (1789) 3 Term Rep. 271, 17 Digest 61, 650.
 3. *Butter vs. Woolcatt* (1805) 2 Bos & P. N. S. 64, 17 Digest 61, 651.
 4. *Harris vs. Allwood* (1892) 57 J. P. 7 D. C., 17 Digest 61, 659.
 5. *Laelough vs. Towle* (1800) 3 Esp. 114 N. P., 17 Digest 54, 594.
 6. *Bowmen vs. Harsey* (1837) 2 Mood & R 85 N. P., 7 Digest 66, 692.
 7. *Rushforth vs. Hodfield* (1905) 6 East. 519; 2 Smith K. B. 634; 8 Digest 220, 1407.
 8. *Wood vs. Wood* (1823) 1 C. & P. 59 N. P.; 17 Digest 31. 340.

possession of the carriage as insolvent's property.¹

HIRE OF BARGES.

Coal merchants at London hire barges. The barges Coal trade. have the names of the hirers painted on them. Such a custom was recognized and it was held that these barges did not vest in the assignee on the insolvency of the coal merchant.²

MEANING OF "ABOUT."

In coal trade at New Castle the word 'about' in the contract gave the vendors option to supply goods 5 % above or below the quantity mentioned in the contract.³

BROKERS IN LONDON SELLING ON BEHALF OF FOREIGN PRINCIPALS TO BE NAMED IN THE CONTRACT AND TO BE LIABLE TO PURCHASERS AS PRINCIPALS.

A corn factor and *del credere* agent in London was Corn trade instructed by a corn merchant in Ireland to sell oats. The oats, thus sold, proving to be of inferior quality, the factor had to make up the difference. In a suit to recover this difference it was held that, by the usage of London corn trade, the factor had the authority to sell in his own name.⁴

PURCHASER TO PAY FACTOR UPON DISCOUNT WITHIN TWO MONTHS.

The usage in corn trade in London is that a buyer can pay the purchase money to the factor within two months of the purchase. Within these two months therefore, the principal, if desirous of getting money, must call upon the factor; he has no locus standi to sue the buyer.⁵

PURCHASER'S RIGHT TO REJECT FOR DIFFERENCE OR VARIATION IN QUALITY.

By the custom of London Corn Exchange the buyer cannot reject the goods for variation in quality; unless the difference is excessive and unreasonable and the same is decided by the arbitrator in the contract.⁶

DIFFERENCE BETWEEN 'GOOD' AND 'FINE' BARLEY.

There is a distinction between 'good' and 'fine' barley in London.⁷

1. Bartram vs. Payne (1827) 3 C. & P. 175; 5 Digest 752, 6488.

2. Watson vs. Peache (1834) 1 Bing. 327; 17 Digest 56, 612.

3. Societe Anonyme L'industrielle Russo-Bilge vs. Scholefield (1902) 7 Can. Cas 114 C. A.; 17 Digest 57, 615.

4. Jhonston vs. Osborne (1841) 11 Ad. & El. 549; 17 Digest 43, 478.

5. Heisch vs. Carrington (1833) 5 C. & P. 471 N. P., 17 Digest 57, 619.

6. Re Walkers, Winsor & Hamm & Shaw, Son & Co. (1904) 2 K. B. 152; 17 Digest 31, 346.

7. Hutchinson vs. Bowker (1839) 9 L. J. Ex. 24; 17 Digest 39, 433.

PURCHASER'S RIGHT TO REJECT FOR VARIATION IN SAMPLE.

By the custom of the Liverpool corn market, if the goods are sold by sample, the purchaser must examine the bulk of corn sold on the date of sale. If he does not do so he cannot afterwards reject the corn for variation of quality.¹

MEASUREMENT OF BOMBAY COTTON CARGOES.

Cotton trade.

As freight is charged on measurement and so the bails of cotton are subjected to heavy pressure before shipment. Goods were shipped at Bombay and after unloading at Liverpool they were taken out of the bails and greatly expanded. The Shipping Company demanded freight on the measurement of expanded cotton. It was held that the custom at Bombay was to pay freight on measurement of goods taken before shipment.²

Cycle trade.

Retailers are described as agents for sale in contracts.³

PLEDGE BY SALE AGENT.

Diamond trade.

An agent, by the custom of diamond trade, had no authority to pledge them, when he was entrusted with diamonds with a view to show them for sale.⁴

SALE WITH CONDITION OF APPROVAL.

Drug trade.

When goods are sold subject to the condition that they can be approved or disapproved until a fixed day, they cannot be dis-approved after the expiry of the day fixed in the contract.⁵

SEA DAMAGED GOODS.

Drug merchants usually enter in their catalogue a heading 'Sea damaged goods' which bear reduced prices.⁶

MEANING OF SODA CRYSTALS.

By the custom of trade 'Soda Crystals' connote articles substantially containing crystalized carbonate of soda rather than crystalized sulphate of soda.⁷

Dry goods trade

According to the usage of dry goods market in

1. Sanders vs. Jameson (1848) 2 Car & Kir 557 N. P.; 17 Digest 57, 620.
2. Buckle vs. Knoof (1867) L. R. 2 Ex. Ch. 125; 17 Digest 31, 337.
3. John Griffiths Cycle Corporation Ltd. vs. Humber and Co. Ltd. (1899) 2 Q. B. 414, C. A.
4. Re Fowler Exparte Brooks (1883) 23 Ch. D. 261, 5 Digest 805, 6881.
5. Humphries vs. Carvalbo (1812) 16 East. 45; 17 Digest 59, 636.
6. Jones vs. Bowden (1813) 4 Taunt 847, 17 Digest 59, 637.
7. Fowler vs. Cripps (1906) 1 K. B. 16; 17 Digest 59, 638.

London a broker who contracts to sell without disclosing his principal is personally liable.¹

A and B were employed to sell the estate of C. A Estate Agents found a purchaser D and told him about the particulars of the estate of C. D later on bought the estate through B. By the usage of trade A was held entitled to the commission.²

LIABILITY OF BROKER FOR UNDISCLOSED PRINCIPAL.

By the usage of London fruit trade a broker acting Fruit trade. for undisclosed principal is personally liable, notwithstanding the fact that he subsequently disclosed the name of the principal.³

GOODS SENT FOR APPROVAL CONSIGNEE LIABLE FOR RISKS.

A person ordering goods on 'memorandum' or on Fur trade. approval is liable to the person from whom he has ordered the goods, for any injury or loss occasioned in his hands before signifying approval.⁴

WAGES OF FRAME WORK KNITTER.

The wages of a knitter is subject to the following Glovers. customary deductions (1) frame rent (2) rent for premises (3) payment to a boy for winding yarn (4) commission paid to master manufacturer.⁵

By the usage of glove trade the glovers can terminate the agency of their sale agents on six months notice.⁶

It is customary to deduct the amount of injury Hat trade. sustained by the hats in dyeing process from the dyeing charges.⁷

TIME FOR PAYMENT.

The purchase money for hop is, according to the Hop trade. custom prevailing in the hop market, payable on the succeeding Saturday week.⁸

1. *Imperial Bank vs. St. Katherine's Docks Co.* (1877) 5 Ch. D. 195, 1 Digest 636, 2580.

2. *Murray vs. Currie* (1836) 7 C. & P. 584; 1 Digest 498, 1703.

3. *Fleet vs. Minton* (1871) L. R. 7 Q. B. 126; 17 Digest 37, 425.

4. *Bevington & Morris vs. Dale & Co. Ltd.* (1902) 7 Cam. Cas. 112; 17 Digest 61, 648.

5. *Chawner vs. Cummings* (1846) 8 Q. B. 311; 17 Digest 60, 646.

6. *Toynson vs. Hunt & Son* (1905) 93 L. T. 470; 17 Digest 60, 647.

7. *Bamford vs. Harries* (1816) 1 Stark 343 N. P.; 17 Digest 61, 649.

8. *Durriel vs. Evans* (1862) 1 H. & C. 174; 17 Digest 62, 663.

MEANING OF 'AT SO MANY SHILLINGS.'

"At so many shillings means "at so many shillings per hundredweight."¹

RIGHT OF PURCHASER.

Where a portion is damaged by water, the purchaser can refuse to accept the whole.²

LIABILITY OF BROKER.

Broker acting for un-named principal and the principal; both are liable in hop trade.³

USAGE TO LEAVE GOODS PURCHASED WITH SELLER.

Purchaser left some hops in the premises of the seller, who became insolvent. In a claim against the trustees, the usage of hop merchants to leave goods purchased in the premises of the seller was recognized.⁴

WARRANTY AT THE TIME OF THE SALE.

A warranty that the bulk of the hops sold should correspond with the sample does not carry with it the implied warranty that the commodity should be merchantable.⁵

REMUNERATION OF HORSE DEALER.

Horse dealer.

Executrix disputed the amount claimed by a horse dealer as charges connected with the sale of horses for the testator on the allegation that he had sold as an agent of the testator on commission. The horse dealer alleged that he had sold the horses on the condition of paying a fixed sum for each horse and reselling it on his own account and keeping the difference as profits for himself. It was held that this was the custom with all good horse dealers.⁶

CUSTOM TO TAKE HORSES FOR SALE OR RETURN.

It is customary to send the horse to a dealer for sale or return. Thus when the dealer became insolvent the horse was excluded from his properties as it should have been returned to its true owner.⁷

1. *Shicer vs. Cooper* (1841) 1 Q. B. 424, 17 Digest 62, 664.

2. *Callard vs. South Eastern Railway Co.* (1861) 7 H. & N. 79; 17 Digest 62, 665.

3. *Pike vs. Ongley* (1887) 18 Q. B. D. 708; 17 Digest 62, 667.

4. *Re Taylor, Exp. Dyer* (1885) 53 L. T. 768; 5 Digest 806, 6884.

5. *Parkinson vs. Lee* (1802) 2 East 314, 39 Digest 454, 811.

6. *Re Leigh's Estate, Rowelifee vs. Leigh* (1877) 6 Ch. D. 256; 17 Digest 40, 443.

7. *Re Florence Exp. Wingfield* (1879) 10 Ch. D. 591; 5 Digest 806, 6885.

LETTING OUT HORSES.

There is a custom in London to let horses to coal merchants, brewers, and iron mongers etc., on hire, which will rebut the reputation of ownership.¹

LIEN OF TRAINER.

By the usage of trade a trainer of a race horse is bound to send the horse to any race the owner chooses and the jockey is appointed by the owner; so there is no lien of the trainer over the horse for his charges.² Horse racing.

MEANING OF CROSS COUNTRY.

"Cross Country" means that the riders should go over all obstructions and are not at liberty to avoid themselves of open gates.³

HIRE OF HORSES FROM CARTING CONTRACTORS.

Coal merchants, brewers and iron mongers etc., in London hire horses from coal merchants. This custom does not confer any right of reputed ownership in the hirer.⁴ Iron and coal trade.

A firm of brewers, coal merchants and general contractors sold a horse but took it on hire from the vendee simultaneously; so that the horse remained in the premises of the firm. The firm was later on adjudicated insolvent. It was held that the property in the horse did not vest in assignee in bankruptcy.⁵

By the usage of iron trade, a vendor can claim no lien against a holder for value of warrants for goods "deliverable f. o. b. to A. B. or their assigns by endorsement thereon."⁶

PAYMENTS OF SUMS DUE FOR WHARFAGE.

Where goods are imported, the importer by the course of trade pays wharfage etc., on the following Christmas, no matter whether the goods have, during this interval, been removed.⁷

TO ACCEPT OFFER IN THE COURSE OF POST.

Where by the usage of iron trade, a merchant is

1. *Re Nichalls Exp. Wiggins* (1832), 2 Deac & Ch. 269, 5 Digest 806, 6886.

2. *Forth vs. Simpson* (1849) 13 Q. B. 680, 17 Digest 41, 458.

3. *Evans vs. Pratt* (1842) 3 Man & G. 759; 17 Digest 73, 742.

4. *Re Nichalls, Exp. Wiggins* (1832) 2 Deac. & Ch. 269; 5 Digest 806, 6886.

5. *Re Calson & Mills Ex. Eliner* (1865) 13 W. R. 476; 5 Digest 806, 6887.

6. *Merchant Banking Co. of London vs. Phoenix Bissimer Steel Co.* (1877) 5 Ch. D. 205; 17 Digest 63, 679.

7. *Crawshay vs. Homfray* (1820) 4 B. & Ald. 50; 17 Digest 63, 673.

bound to accept or to refuse through post the offer of another merchant and such acceptance is made in accordance with the time and conditions contained in the offer, the contract is complete, though some accident of the post office delays the delivery of the letter containing acceptance by one post.¹

LEASE OF IRON WORKS.

Where iron works are let, the machinery fixed in the free-hold goes along with it. Such machinery continues to be the property of the lessor and cannot, therefore, vest in the assignee in bankruptcy of the lessee.²

CUSTOM TO HAVE SAFES FOR SALE OR RETURN.

Retail iron mongers get safes for sale or return, or to sell as agents. They do not thereby become the owners. The doctrine of reputed ownership does not apply.³

No. 1 PIG IRON.

"No. 1 pig iron" is equivalent to "Clyde and Dundy-van iron."⁴

CUSTOM TO HIRE FURNITURE.

Hotel keepers ordinarily hire furniture. The person giving credit, therefore, cannot rely upon, nor can an assignee in bankruptcy of the hotel keeper seize such furniture as owned by the hotel keeper.⁵

The courts should take judicial notice of this custom and extend the doctrine to all articles needed for furnishing the hotel.⁶

By the usage of linen trade American correspondents get twelve months credit and English merchants get fourteen months credit and after that interest is charged.⁷

NO COMMISSION ON GOODS NOT ANSWERING REQUIRED DESCRIPTION.

A was sent to Africa to ship dry merchantable oil and to receive commission. Held that he was not entitled to commission as the oil sent was "wet" though merchantable.⁸

1. *Dunlap vs. Higgins* (1848) 1 H. L. Cas 381; 17 Digest 63, 674.

2. *Rufford vs. Bishop*; *Bishop vs. Rufford* (1829) 5 Ruso. 346. 5 Digest 807, 6892.

3. *Re Lock Exp. Poppleton* (1891) 63 L. T. 839; 5 Digest 805, 6880.

4. *Mackenzie vs. Dunlap* (1856) 3 Macq. 22; 17 Digest 63, 675.

5. *Crawcour vs. Soltir* (1881) 18 Ch. D. 30; 5 Digest 806, 6888.

6. *Re Parker Exp. Turquand* (1885) 14 Q. B. D. 636; 5 Digest 807, 6889.

7. *Eddows vs. Hapkins* (1780) 1 Ding. K. B. 376; 17 Digest 56, 606.

8. *Warde (Ward) vs. Stuart* (1856) 1 C. B. N. S. 88, 5 Digest 527; 1857.

Inn keepers.

Linen Trade.

Oil and oil seeds
trade

PACKER'S LIEN.

A packer can retain goods till his packing charges and other prior debts are paid up; even though the debtor should become insolvent.¹ Packing trade.

CUSTOM TO LET PIANOS.

Four months prior to his bankruptcy debtor hired a piano from H & Co. upon following written terms "£ 15 a year for three years, by equal monthly payments of 15 S." at the expiry of which term the piano became the property of the hirer but in case of default, death, or insolvency of hirer, before the term, H & Co. were to determine the contract and take possession of the piano. Such an agreement is customary in piano trade.² Piano trade.

CUSTOMARY HOLIDAYS.

Workers get the benefit of certain customary holidays, though the contract makes no mention of the same.³ Pottery trade.

By the custom of the potting trade the employment of the printer is from Martinmas to Martinmas subject to a month's notice from either side, and the printer should find a 'transferor' to assist him.⁴

By the custom of trade the printer can demand payment only after the completion and delivery of the work.⁵ Printing Trade.

Printing and news paper proprietors deal with auctioneers as principals and allow them a trade discount not allowed to auctioneer's customers when dealing directly.⁶

Printing machines, other than type, are by a well established custom of the printing trade let on hire by the owners to printers, and do not pass to the trustees in bankruptcy of the hirer.⁷

TERMINATION OF BROKER'S AUTHORITY TO SELL.

In the absence of an express condition to the contrary, the authority of the broker to sell the goods of his principal according to a custom of the Irish Provision trade Provision Trade

1. Exp. Deeze (1740) 1 Deac. 684; 32 Digest 240, 257; Also see Re Witt Exp. Sheebbock (1876) 2 Ch. D. 489; 17 Digest 38, 426.

2. Re Blanshard, Exp. Haltersley (1878) 8 Ch. D. 601; 5 Digest 807, 6894.

3. R vs. Stoke upon Trent (1843) 5 Q. B. 303; 17 Digest 56, 602.

4. Grainger vs. Aynsley, Bromby vs. Tarus (1880) 6 Q. B. D, 182; 17 Digest 56, 603.

5. Gillett vs. Mawman (1808) 1 Taunt 137; 17 Digest 66, 693.

6. Hippisby vs. Knee Brothers (1905) 1 K. B. 1; 1 Digest 481, 1616.

7. Re Thackraty Exp. Hughes and Kimber Ltd. (1888) 4 T. L. R. 659; 5 Digest 807, 6895.

terminates on the end of the day it is granted.¹

DAMERARA SUGAR.

It is a yellow Crystalized Cane Sugar. The name refers to the process of manufacture and not to any place.²

Rice trade.

In the rice trade a broker is liable as principal when the latter's name is not disclosed in the contract, although it is mentioned orally.³

Servants.

A hiring of a servant without mention of time is a hiring for a year. Such a contract is not within the Statute of Frauds.⁴

A head gardner is a menial servant and one month's notice is sufficient to terminate his services.⁵

Obedience being the rule, wilful dis-obedience is a reasonable ground for dismissal of a domestic servant. The contract even if for a year can be determined by a month's notice or after paying a month's pay.⁶

The following periods have been recognised sufficient, for notice to determine the services of the various classes of servants.

Commercial traveller—three month's notice.⁷

Calico printer's salesman—a month's notice.⁸

Editor—12 months' notice.⁹

Sub-editor—6 months' notice.¹⁰

Transferor or potting printer's assistants—no notice.¹¹

Woollen merchants' representative—month's notice.¹²

Newspaper printers—four weeks' notice.¹³

Clerk in finance office—3 months' notice.¹⁴

1. Dickinson vs. Lilwal (1815) 4 Camp. 279; 1 Digest 693, 1322.
2. Anderson vs. Britcher (1913) 110 L. T. 335, 17 Digest 61, 657.
3. Boc Meister vs. Fenton Levy & Co. (1883) 1 Cal. El. 121; 17 Digest 61, 655.
4. Beeston vs. Collyer (1827) 4 Bing. 309; 12 Digest 124, 815.
5. Nowlan vs. Abbett (1835) 150 E. R. 23, 34 Digest 36, 131.
6. Turner vs. Mason (1845) 14 M. & W. 112; 34 Digest 69, 463.
7. Grundon vs. Master & Co. (1885) 1 T. L. R. 205; 34 Digest 67, 434.
8. Appliby vs. Johnson (1874) L. R. 9 C. P. 158; 34 Digest 48, 234.
9. Holcroft vs. Barber (1843), 1 Car & Kir 4; 37 Digest 541, 32; Brennan vs. Gilbert Smith (1892) 8 T. L. R. 284; 37 Digest 540, 25.
10. Chamberlain vs. Benneth (1892) 8 T. L. R. 234; 37 Digest 541, 30.
11. Grainger vs. Aynsby (1880) 6 Q. B. D. 182 at 184.
12. Parker vs. Ibbetson (1858) 27 L. J. (C. P.) 236; 34 Digest 97, 721.
13. Cunningham vs. Foublanqua (1833) 6 C. & P. 44, 37 Digest 539, 13.
14. Foxall vs. International Land Credit Co. (1867) 16, L. T. 637, 34 Digest 56, 309.

Journeymen carpenters¹ and advertising agents² can be discharged after payment of travelling expenses and commission of orders received after dismissal respectively.

In Caen stone trade half the freight is paid in cash and half by bill of two months³ Stone trade.

In Portland stone trade if stone is shipped for quarry the freight is to be paid by the purchaser.⁴

GREEN TEA.

Tea imported from China and generally known as 'Green tea' is painted with Gypsum and Prussian blue. Pure 'green tea' is imported from Japan.⁵ Tea and Coffee trade.

A broker got delivery from A of some coffees in West India Dock to sell them to a purchaser and paid by cheque after receiving the dock warrants. The broker sold the coffee to the plaintiffs and delivered the dock warrants after being paid. Broker's cheque was dishonoured and A stopped the goods in the ware-house. Held: plaintiffs had a right to recover in trover against A. By the custom of the trade there was a complete transfer defeating the right of stoppage.⁶

In Calcutta tea trade reliance is placed on weight marked on boxes.⁷

MEANING OF 'SOUND'.

Sound timber is to be judged after making fair and reasonable allowance for unsound parts.⁸ Timber Trade.

TO LOAD DECK CARGO.

Part of the timber loaded from Quebec to London was, by the custom of loading timber between Quebec and London, placed by the owner of the vessel over deck. A storm broke out and to preserve the ship the timber on the ship was thrown over board. The owner of the vessel was held liable to contribute to the owner of the timber in a general average.⁹

1. Read vs. Dinisnore (1840) 9 C & P 588, 34 Digest 77, 546.

2. Beltany vs. Eastern Morning & Hull News Co. Ltd. (1900) 10 L. T. R. 401, 1 Digest 522, 1822.

3. Luard vs. Butcher (1846) 2 Cart-Kir 29 N. P.; 17 Digest 66, 697.

4. Dickenson vs. Lano (1860) 2 F. & F. 188, 17 Digest 66, 698.

5. Roberts vs. Egerton (1874) L. R. 9 Q. B. 494; 17 Digest 67, 704.

6. Zwigger vs. Samuda (1816) Holt N. P. 395; 17 Digest 67, 706.

7. Lister and Biggs vs. Barry & Co. (1886) 3 T. L. R. 99.

8. Wood house vs. Swift (1836) 7 C & P 310, 17 Digest 68, 707.

9. Gould vs. Oliver (1837) 4 Bing. N. C. 134; 17 Digest 68, 708.

By the custom of timber trade in London when timber is sold at auction including duty in London the buyer is to pay at a price including duty.¹

MEASUREMENT OF CROSS DIMENSIONS.

By the usage of Hardwood timber trade the fractions of quarter of an inch are neglected in measuring cross dimensions.²

MEANING OF "ABOUT 500 LOADS".

"About 500 loads" means 10 % more or less.³

DANZIG OAK LOGS: MODE OF DISCHARGE.

The practice is that the cargo of oak logs is discharged from the dock into the railway trucks. It is possible, however, to discharge the cargo into lighters even. It follows that if railway trucks are not available, the cargo should be discharged into lighters.⁴

Tobacco Trade,

In tobacco trade all sales are by sample, though the bought and sold notes do not mention the fact.⁵

The custom of tobacco trade of leaving the goods and the dock warrants in possession of the seller is unreasonable as it can enable the seller to defraud a second purchaser or pledgee.⁶

PAYMENT OF WAREHOUSE RENT.

Ware housemen
and wharfingers,

There is a custom in Liverpool that if the goods sold remain in warehouse after sale the vendor pays the rent upto two months.⁷

GENERAL LIEN IN LONDON.

A custom of general lien over goods stored in the ware-house for all rent due and general balance of account was held to be unreasonable.⁸

In Bristol, however, a ware-house keeper has a genral lien over all goods ware-housed for all ware-house rent, labourage and other charges whether past or present

1. Clark vs. Small field (1861) 4 L. T. 405, 17 Digest 42, 460.

2. Young vs. Canning Jarrah Timber Co. Ltd. (1899) 4 Cam. Cas 96, 17 Digest 68, 711.

3. Harland & Wolff Ltd. vs. Burstall & Co. (1901) 84 L. T. 324, 17 Digest 69, 712.

4. Rode Nacker vs. Kay (1901) 6 Com. Case 37, 41 Digest 549, 3775.

5. Syers vs. Jonas (1848) 2 Exch. 111, 17 Digest 69, 713.

6. Jhonson vs. Credit Lyonnals Co. (1877) 3 C. P. D 32, 17 Digest 69, 714.

7. Groves vs. Hepke (1818) 2 B & Ald. 131, 17 Digest 69, 715.

8. Lenchhart vs. Cooper (1834) 3 Bing. N. C. 99. 32 Digest 241, 266.

and whether in connection with the good ware housed or other goods stored in the past.¹

A whar-finger has a lien on goods brought to his wharf for the balance of a general account.²

There is a custom of deduction from wages for faulty work.³ Weaving trade.

RULES OF "FAST AND LOOSE."

The law regarding the whales both by the custom of Greenland and the determinations at Guildhall, London is as follows:—While the harpoon remains in the fish and the line in the control and management of the striker, the whole is a fast fish, and though during that time struck by a harpooner of another ship and though she afterwards breaks from the first harpoon but continues fast to the second harpoon. But if the first line breaks or the fish is not in the control of the first harpooner, the fish is loose fish and will become the property of any other person who strikes and obtains it.⁴ Whaler.

By the usage of the (Greenland) whale fishery, a fish is to be considered a fast fish, which is attached by any means such as the entanglement of the line round harpoon though it does not continue in the body of the fish.⁵

CUSTOM OF GALLIPAGOS ISLANDS.

By the custom of the whale fishery among the Gallipagos Islands he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it. By the custom of the Greenland whale fishery, unless he who first strikes a fish continues his dominion until he has reduced it into possession, any other person who kills it acquires the entire property.⁶

CUSTOM IN REGARD TO GOODS SOLD IN BOND.

In Liverpool it is customary in wine and spirits trade to leave goods sold in bond to remain in the bonded ware house of the seller till required for use by purchaser Wine and Spirit trade.

1. *Re Catford Exp. Carr vs. Ford* (1894) 71 L. T. 584, 32 Digest 241, 268.

2. *Naylor vs. Manglio* (1794) 1 Esp. 109 N. P., 32 Digest 272, 270; *Holjerness vs. Callinson* (1827) 7 B & C 212, 17 Digest 25, 266.

3. *Sagar vs. Ridehalgh and Son Ltd.* (1931) 1 Ch. 310 C. A.; Digest Supp. *Hart vs. Riverdale Mill Co. Ltd.* (1928) 1 K. B. 176; Digest Supp.

4. *Littledale vs. Scaith* (1788) 1 Taunt 243, n. 25 Digest 59, 500.

5. *Hogarth vs. Jackson* (1827) 2 C & P. 595, 25 Digest 59, 502.

6. *Tennings vs. Grenville (Rord)* (1808) 1 Taunt 241. 25 Digest 159, 506.

J. N. D.
Advocate High Court
Jammu & Kashmir

and so the usage excludes the doctrine of reputed ownership.¹

Even if whisky is left in the ware-house of a third person and not that of the vendor the usage excludes the doctrine of reputed ownership.²

Wool trade.

Goods are delivered only when payment has been made.³

Where a vendor sells goods through a broker, notice given to the broker is notice to the vendor.⁴

One month's notice is necessary to terminate the services of an agent or a representative.⁵

The custom in vogue in Liverpool wool trade is that a broker is authorized to contract in the name of the principal. The broker may, however, make himself personally liable for the price at the request of the seller.⁶

Australian wool trade.

Before wool is shipped at Sydney it is received by the Stevedores of the ship to be pressed. By the prevailing practice the receipt issued by the Stevedores is equivalent to a mate's receipt and is exchanged for bills of lading.⁷

1. *Re Couston Exp. Watkins* (1873) 8 Ch. App. 520; 5 Digest 808, 6898.
2. *Re Couston Exp. Vaux* (1874) 9 Ch. App. 602; 5 Digest 808, 6899.
3. *Shartoli vs. Benuke* (1850) 10 C. B. 212; 17 Digest 47, 526.
4. *Greeves vs. Legg* 29 L. T. O. S. 145; 17 Digest 70, 725.
5. *Parker vs. Ibbetson* (1858) 4 C. R. N. S. 346, 17 Digest 70, 725.
6. *Croppar vs. Cook* (1868) L. R. 3 C. P. 194; 17 Digest 71, 726.
7. *Australian Agriculture Co. vs. Saunders* (1875) L. R. 10 C. P. 668; 17 Digest 71, 729.

APPENDIX II.

COMMERCIAL VOCABULARY.

GENERAL TERMS AND ABBREVIATIONS.

Accommodation bill.	It is a kind of bill in which no consideration passes between the drawer and the acceptor. It is drawn only to enable the drawer to raise loan from banks by discounting the same. The bill is ultimately paid by the drawer himself through the drawee.
Authorized capital.	It includes the total value of the shares including unissued and unsubscribed capital.
b. e.	Bill of Exchange.
Bonded warehouse.	Goods on which custom has not been paid are said to be lying in bonded warehouse. Those goods are called bonded goods.
Book debts.	Assets in shape of debts from clients and written in the account books.
b. l.	Bill of lading.
b. o.	Branch office.
b. p.	Bill of parcels; Bills payable.
Boom.	Period of rise in prices.
Slump.	Period of fall in prices.
Bull.	A speculator who purchases forward in the expectation that prices would rise and he would be able to sell at profit before the date of delivery. In Hindustani he is called " <i>Teji wala</i> ".
Bear.	A speculator who sells in the hope that he would be able to purchase at lower prices before the date of delivery. In Hindustani he is called " <i>Mandi wala</i> ".
Bull or Bear Account.	When purchases made by bulls exceed the sales made by bear it is said to be bull account; similarly when the bear sales exceed the bull purchases there is bear account.

Bull campaign or bear raid.	Circulation of such news as would create an artificial rise in the market. This is done by bulls who want to unload themselves at profits. This state is called 'Bull Campaign'. Similar action by bears to create artificial fall in prices is called "Bear raid.
Bull liquidation.	Bulls always purchase in the hope that prices would rise; but if, contrary to their judgment, it begins to fall, they are compelled to sell and this is called 'Bull liquidation' or 'unloading by bulls'. These sales lead to artificial fall in the prices.
Bear covering.	Bear sells a commodity expecting a fall in prices; but if prices begin to rise he is forced to purchase in order to enable himself to fulfil the promise on the due date. These purchases lead to artificial rise in prices and are called "Bear Covering"
Bullion.	Gold and Silver.
c. a. d.	Cash against documents. The moment the buyer is handed over the bill of lading the value indicated in the bill becomes payable.
c. i. f.	Carriage, Insurance and Freight. The price which is quoted at the port of destination excluding custom duty and incidental charges.
c. & f.	Cost and freight i. e. buyer shall have to pay insurance and duty. Rest is paid by seller.
C. O. D.	Cash on delivery-Cash payable after the delivery of goods.
C. W. O.	Cash with order.
Contingent liabilities.	Liability of a drawer of a bill of exchange in case it is dishonoured by the acceptor.
Cost account or cost sheet.	Detailed account of cost in each process of manufacture to show the total cost of production.
Current account.	Money deposited in bank and payable on demand without notice.

Debentures.	Loans raised by the Company at a certain rate of interest. They are assignable, and interest is paid by "interest warrants."
Demurrage.	Charges imposed by railway for retention of the custody of goods after the authorized time namely three days.
Derelect.	Ship abandoned at sea as lost or irrecoverable.
Dividend.	(i) Profits declared annually at a certain percentage of paid up capital. (ii) Part payments made by the Official Receiver to the creditors out of the assets of the insolvents.
D. a.	Documents against acceptance. Bill of exchange for the value of goods sent to the buyer for acceptance before the bill of lading is handed over to him.
Documents against payment.	Buyer must pay before taking delivery.
E. & O. E.	Errors and omissions excepted. These are witten at the end of a bill to safeguard payment in case the bill is found erroneous.
F. a. s.	Free alongside a ship—Seller will pay all charges until the goods are kept near a ship for consignment e. g. packing and conveyance etc. Buyer will pay all freight, insurance, transhipment, slinging, custom and clearing charges etc.
F. o. b.	Freight on board. Seller must pay for packing, cooly and conveyance while the buyer freight, insurance, duty and clearing charges.
F. o. r.	Free on rail i. e. delivered free of charge on rail road car for transportation.
Five per cent for cash.	A discount of five per cent. would be paid if the buyer pays cash.
Folio.	Page of account book.
Free delivery	All charges to be paid by seller till the the time of delivery.

Freight.	Charges of conveyance by a railway or steamship.
Futures.	Purchase or sale of goods deliverable in future.
Hedge contract.	Contract made to protect oneself from loss. Suppose A contracts to supply shellac three months after. In order to avoid the risk of future fluctuation in prices he would, in his turn, purchase seed lac deliverable in three months. This is called 'Hedge Contract'.
Interest warrant.	Cash order for payment of interest when it becomes due.
Invoice.	Detailed account giving weight, quality and quantity of goods, rate, value and discount etc.
I. O. U.	In account stated after accounting is done these letters are written to acknowledge the balance due after accounting.
Letter of credit.	It is like a bill of exchange. Bill of exchange is an order to pay and letter of credit is merely a request. The addressee may or may not pay.
o/a.	On account of.
Paid up capital	Shares are usually paid up in three instalments (i) with application (ii) when share is issued and (iii) when call is made by the company. All three included i. e. the amounts actually paid are called 'paid up capital.'
Par.	Of equal value. Selling at premium means selling at more than the paid up value of the share. Selling at discount means selling at less than the paid up value.
Proforma invoice.	It is like an ordinary invoice but not sent with goods. It is to give an exact idea to the customer what he will have to pay if he were to order for the goods mentioned in the proforma invoice.
Prompt cash.	Cash payment soon after delivery.
Prompt cash less 45 days.	Cash payment soon after delivery less discount for 45 days.

Promotion money.	Amount paid to promoters of a company.
Stale bills.	Bills presented after the period prescribed for presentment. In such a case the Bank has the right to refer to the drawer before making the payment.
Tare.	Weight of a case, cask or vehicle wherein goods are loaded.
Tone of the Market.	State of market with regard to the ruling prices and the volume of business transacted.
Dull, hesitant or quiet tone.	Absence of business in the market and the consequential want of indication of the prices.
Weak tone.	Tendency towards fall in prices.
Firm tone.	Tendency of rise in prices.
Irregular or Indifferent tone.	Fluctuating prices.
Steady tone.	No fluctuation in prices.
Healthy or confident tone	Prices are good.
Bearish tone.	Tendency to fall.
Bullish tone.	Tendency to rise.
Turn over.	Total sale during a given period.
Two months net.	Buyer can pay within two months from the date of the bill but if earlier payment is made no claim for discount can be put forward.

Banking and Commission agency.

Arhat.	Commission agency.
Arhatia.	Commission agent.
(a) Kachcha.	Who introduces <i>Veopari</i> to a purchaser.
(b) Pacca.	Proper commission agent.
Asami.	Client.
Badni ka satta.	<i>Khatti</i> speculation.
Beejak.	(i) Invoice.
	(ii) Forward sale of a <i>Khatti</i> .
Beopari.	Creditor or money lender.
Chhut.	Rebate.

Chittha.	Rough account.
Darshani hundi	Sight bill.
Dast Gardan.	Loan on verbal promise.
Deohra lagana.	To square up.
Dharmada.	Charity charges.
Ganth kholā.	Opening of purchases usually made by village money lenders.
Gumashta.	Agent who manages business.
Hath Udhar.	Parole debt.
Hundi.	Bill of exchange.
Karda.	Dust.
Karkhana.	Workshop.
Karkhanadar.	Master artizen.
Katauti.	Discount.
Khandsali.	Dealer in sugar.
Khatti.	Grain pit.
Kotha.	Barn.
Kothi.	Business firm.
Kothi wala.	Big Banker.
Mahajan.	Money lender.
Mandi.	Market.
Muddatti Hundi.	A bill of exchange drawn for a specified period.
Munim.	Book keeper or accountant.
Nazrana.	(i) Present.
	(ii) Brokerage.
	(iii) Double-option transaction.
Pheriwala.	Pedlar.
Qist.	Instalment-Method of lending on instalment system.
Qistbandi.	Instalment system.
Qistia.	Money lender on instalment system.
Rojahi.	Daily, a kind of qist.
Sahukari.	Money lending.
Sharraf.	Banker or dealer in gold and silver.
Sawai.	One and a quarter—a kind of loan system in which repayment is made of one

and a quarter of the loan.

Taqavi.

State loan.

Tola.

Weighman.

Terms used in Brass and Copper trade.

Bhangar.

Worst kind of copper.

Bharat.

Alloy of zinc and copper.

Ganga Jamni.

Articles made partly of one metal and partly of another.

Jarti.

Oxidization of metal in the process of melting.

This dificit is classed in the cost of production.

Kunai.

Polishing.

Khunti.

Cast metal plate.

Pana.

Metal sheet beaten from a brass plate

Phul.

Bill metal.

Ubhar ka kam.

Raised work.

Alto Rilievo.

Zamin Dabi

Bas relief.

Hui Ubhar.

Terms used in grain trade.

Adheli }
Adholi }

Measures for grain and oilseeds.

Bahangi.

A pole the ends of which are connected by ropes to a flat contrivance for carrying loads, the pole being balanced on the shoulder. (Also Banka, Kawad).

Bandha.

Shallow dug-out half above and half below the ground, used for storing grain, etc.

Bardana.

Sack—usually refers to the jute sacks or gunny bags used in the produce trade (see also bora).

Baya.

Weighman or measurer.

Bayai.

Market tax.

Bazar Dhara.

Bazar terms.

Beòpari.

A trader; an intinerant merchant.

Bhandari.

Store-keeper.

Boma.

An open-end spear used for drawing

	samples from bagged grain or seed. (see also parkhi).
Bora.	See bardana, basta.
Britty.	A retaining fee or allowance.
Chabeni.	Food or diet allowance.
Chaudhri.	Headman.
Charhia or Charrahia.	Labourer who holds the bag near the scale or puts the bag on the pan at the time of weighment.
Cholam.	Sorghum Vulgare. One of the millets grown in south India.
Dandidar.	Scaleman.
Deorhi.	One and a half times; system of loans in which one and a half times the quantities (of seed) borrowed are refunded.
Dhalta.	Draftage or weighment allowance in favour of buyer.
Dhara.	Literally—flow; practice.
Dhola.	Receptacles made out of bamboo splits, used for storage of grains and oil-seeds.
Dholi.	Diminutive of Dhola.
Dokra.	Half anna (Terms used in Bombay grain trade).
Gaddi.	Literally “a mattress;” (the term is applied to denote a place of business, from the fact that it is customary for the clerks employed by arhatiyas, sharrafs, etc. to work seated on mattresses.)
Gaddi kharch.	A deduction made by the arhatiya to defray office expenses.
Ganda.	Literally—set of four; the term is used to mean an anna in east United Provinces and adjoining parts of Bihar.
Ganj or Gunj.	A grain market.
Gazar.	A mixture of wheat or gram and linseed.
Ghani.	A primitive arrangement for the extraction of oil, largely used in villages.
Gonta.	A Bihar and Orrissa measure.

Hammal.	A porter or market labourer.
Hammali.	Wages charged by hammal-a porter
Hat.	A periodical market.
Howri.	Name given to white or yellow linseed in the Central Provinces.
Humka.	A method of sale in which the buyer makes his bid after a visual examination of the produce.
Hundi.	A bill of exchange or draft.
Hundikar.	A forwarding or clearing agent.
Karda.	Impurities or foreign matter; also allowance for the same.
Kasti.	Sales made after deducting the impurity content which is determined on the basis of a sample of 5 seers.
Kata.	A Bihar and Orissa grain measure.
Katha.	A Central Provinces grain measure.
Khandy (Candy).	A measure used in the Central Provinces and in some of the adjacent areas.
Kharch gari.	Charges for cart.
Khatti.	Underground pits or dug-outs used for storing grain etc.
Khirwar.	A weight used in the rural areas in Kashmir (equivalent to 83 standard seers).
Kothalas.	Large vase-shaped receptacles made of mud, used for storing grains and oil-seeds. (Also kotha, kothi).
Kotha.	A room in which produce is stored; also a living room.
Kothi.	See kothalas; also a business house.
Kurai.	A United Provinces measure.
Kuro.	A Central Provinces measure.
Lotnas.	A kind of receptacle made of wicker work of rice straw, with a capacity of 2 to 5 maunds of linseed.
Mahajan.	Money-lender or banker, literally, a great man
Manda, Mandi	Literally—cheapness; "Bear" option.
Mandi.	A market.
Mani.	A Central Provinces measure.

Map.	A measure.
Mocha.	A small container made out of rice straw, used for storage for grains and oilseeds.
Muqaddam.	Literally "essential"; hence headman or Chief. Labour contractors and middlemen who figure largely in the Bombay grain and oilseeds trade are also called by this name.
Muddat.	Literally—period. A deduction made by the arhatiya to cover the loss of interest on money which he pays in advance to his seller client.
Munimi.	A deduction made for clerks.
Nakadar.	Scaleman.
Note batta.	Deduction made for making payment in silver and not currency notes.
Pai.	A local weight in Kashmir varying from 20 to 30 seers.
Paila.	A United Provinces grain measure.
Paili.	A Central Provinces grain measure.
Painth.	Periodical market.
Pairoo.	A type of storage receptacle made of bamboo strips and plastered with mud and cow-dung
Palledari.	Labour or handling charge.
Palledar.	Market labourer.
Parkhi.	A sampler; an instrument for drawing samples from bags.
Patti.	Sale receipt.
Phalla.	Beam used in thrashing grain and oilseeds.
Phanki.	A deduction for loss in handling.
Phut-katoti.	A deduction for giving small change.
Pyali.	A Bombay measure of 4 seers.
Rulai.	Rolling.
Sahukar.	A money-lender, from Sahu-respectable.
Sawai.	One and a quarter times; system of

loans when one and a quarter times of (of seed) borrowed has to be refunded.

Teji-Mandi.

Literally—"teji"—dearness, "Bull" option; and "mandi"—cheapness, "Bear" option. "Teji-mandi" a double option, i. e. to buy or sell.

Teli kanta.

Probably a corruption of "tel quel" or "tale quale." A basis of sale according to which the rate is fixed after visual examination of the produce, and no deduction is made for impurities subsequently.

Tulai }
or
Tolai }

Weighing charges.

Gold & Silver Trade.

Anguri ki
chandi.

Highly refined silver.

Bidri work.

Name given to mixed metal (zinc and copper) plated with patterns of silver. The name is derived from Bidar a town in South India.

Diamond cut
work.

Cutting of gold like diamond to give a fine show.

Karawal.

Silver alloyed with zinc.

Kasauti.

Touch stone.

Kundan.

Finest form of gold.

Kundan work.

Plates of fine gold used for setting precious stones.

Mulamma.

Plated with gold or silver.

Malida or
filigree work.

Filigree is made up of wires varying in thickness round or flat.

Niariya.

Gold and silver refiner.

Panna.

Gold leaf.

Pitak.

Alloy of gold and silver.

Ratti
Masha
Tola }

Weights of gold and silver.

Sil.

Slab of silver.

Swansa.

Alloy of gold and copper.

Tanka.

Alloyed metal used for soldering gold and silver joint.

Tezab ka Rawa	Refined gold from gold ornaments.
Thakia ki chandi.	Silver refined from silver ornaments.
Thappa.	Dies of various pattern.
Zarbuland.	Like bidri work but the patterns are raised above the common surface.
Lac and Shellac trade.	
Anti.	A branch of tree 8 or 11 inches long covered with brood lac. 50 such sticks form a bundle known as Tudi or Tora.
Bahilwaya.	Is the Karigar's assistant. It is his business to stretch the Pag with Polin leaf on the porcelain cylinder, and ultimately to draw it into a sheet known as shellac.
Batta.	Refraction on resinous lac. Trade allows 1 or 2 p.c. resin and over and above this Batta is charged.
Beuli lac.	Lac free from dust—pieces of stick etc.
Bhatta.	Oven in which charcoal is burnt and over which bag containing shellac is exposed.
Bhusi or Punkh	Pieces of stick lac etc. obtained by washing stick lac with water. It is used in furnace for reclaiming passeva.
Button lac.	A fine grade of shellac melted and spread into small circular thick discs on plantain system. This contains neither orpiment nor resin and as such is used for various purposes where colour is not the object.
Chapra.	Shellac.
Chauri.	Seed lac which is filled in bags for manufacture of shellac.
Dandi.	Twisted ropes containing shellac.
Fine orange.	A grade of shellac.
Ganthi.	Knots-accumulation of dirt etc. in sheet lac.
Garnet lac.	A grade of shellac from small granular. It is dark red in colour and one tenth inch thick

Gomasta.	Is the under-broker of manufacturer. It is his business to keep his chief informed of the market conditions of his place.
Kanja.	Powdered stick lac.
Khandowla.	Fine dust obtained by sifting washed seed lac.
Kham lac.	Stick lac.
Khud or kardā	Fine dust obtained by shifting ground stick lac before washing it with water.
Kiri.	The residue left within the cloth bag after the melted portion is turned into shellac. It is taken out by the <i>karigar</i> with <i>kiri khudua</i> —and while hot is turned into circular flat cakes.
Lac dye.	Is the colouring matter obtained by washing stick lac with water. The colour is run into large vats where it is allowed to settle. The supernatant is then drawn off through a series of graduated plugs and the thick crimson pulp consisting of chitin visceral contents of dead lac females, wax, and dirt is put under pressure and then cut out into small circular pieces or turned into large flat cakes.
Lakh dana.	Seed lac.
Mulmma.	Fine dust obtained by separating the washed lac. It is generally mixed with khud for making bangles.
Morha.	A twig covered with lac.
Nagli or Negoti.	Kusumli stick lac.
Neera.	Polin leaf 18 inches to 2 ft. long and 3 or 4 inches broad used by Bhilwaya for spreading out Pag on porcelain cylinder.
Grand leaf. Pag or Pagh.	A trade of medium quality shellac. Melted shellac that oozes of the cloth bag and falls on the stone slab in front of the oven.
Pank.	Is the refuse collected on cloth in straining lac dye.
Panna.	Is the melted lac drawn out into the sheet by Bhilwaya.

- Passeva.** Is the residual matter left in the bag. This is obtained by boiling the rope like twisted bags in big iron cauldrons containing alkali. Sometimes the twisted bags are soaked in tanks containing methylated spirit. The resinous matter is taken out and pressed flat into round cakes 8 or 12 inches in diameter and $\frac{1}{2}$ or $\frac{3}{4}$ inches thick.
- Pera.** Is that portion of the cloth bag which is over fire in the oven.
- Perbanda.** A stout iron spatula with which the *karigar* scraps the melted lac from the cloth bag and cooks it in front of the fire in the oven.
- Phunki or Phungi lac.** Stick lac collected after the emergence of young insects.
- Rangeen.** Palas stick lac so called on account of its containing a large quantity of labouring matter.
- Seed lac.** Is the lac obtained by soaking and washing ground stick lac with water.
- Shellac.** Seed lac mixed with resin and orpiment cooked and drawn into sheets.
- Sita.** Lac cells from which young insects have swarmed out.
- Stick lac.** Lac collected either before or after the emergence of young insects.
- T. N.** Grade of shellac containing 2 or 3 p. c. of resin. It is also manufactured pure without any resin or orpiment according to trade requirement.
- Tongue lac.** A special grade of shellac made from transparent pale yellow twisted flakes of resin or female cells. It is usually made in the form of lustrous fine threads.
- Gota.** It sometimes happens that when the bag is being twisted over the fire it gets torn and the contents come out of it. This is known as Gota. It is nothing but chauri and shellac.
- Rangabatti.** Cakes prepared out of dye obtained by washing lac.

Money Market.

**Borrowing on
ways and
means account**

Short loans taken by Government of India from Imperial Bank for current expenditure.

**Short accom-
modation,
short credit.**

Temporary loans given by banks.

Clive Street.

Money market at Calcutta, situated in Clive Street.

**Conversion
loan.**

Loan issued by the Government at a lower rate of interest to pay up the older loan. The holder of the older loan has the option to take payment in cash or to take the new securities.

**Council bills
and reverse
council bills.**

The Secretary of state has to meet certain charges in England on behalf of India. Instead of getting coins from India he sells rupee demand drafts to those who have to send money to India. The drafts are paid by the Government of India. These drafts are called "Council bills." Now-a-days the council bills are not being sold. The Government of India is "purchasing sterling." This is done to provide funds to the Secretary of States for India and to lower the rate of exchange.

When the rate of exchange tends to fall below the lower gold points the Government of India sells demand draft in sterling to those who have to remit money to England. These drafts are called "Reverse Council bills" and also "Sale of sterling by the Government." This is done to enable the Secretary of States to remit money from England to India.

**Deflation or
contraction of
currency.**

Decreasing the volume of currency by removing the government securities of a given amount from the Paper Currency Reserve and cancelling an equal amount of Currency Notes.

Inflation or expansion of currency.

Increasing the volume of currency by adding government securities of a given amount to the Paper Currency Reserve and issuing an equal amount of fresh Currency Notes.

Floating loans.

Short term loans.

Funded Debts.

Long term loans.

Gold points
Specie points.

These are the rates of exchange at which it may be profitable to import and export gold rather than issue bills of exchange. There are 'lower gold point' and 'upper gold point.' They vary according to the cost of carrying gold from one country to another.

Lombard Street.

London money market situated in Lombard Street.

Public Debt.

Debt borrowed by government for public purposes. Loan raised in India is called 'Rupee Debt' and that raised in England is called "Indian Sterling Loan. 'Loans for undertaking giving profits are called' Productive Debts" and others are Unproductive Debts.'

Plethora or Surfeit of Funds.

Abundance of money in the market which cannot be lent at even nominal rate of interest.

Paper Currency Reserve.

Fund held by the government partly in India and partly in England to support paper currency. It consists of gold and silver coins, bullion and government Securities.

Rupee rate.

Equivalent of a rupee in terms of foreign currency specially sterling.

Treasury Bills.

Securities issued by the Government of India to raise temporary loans. Interest on them is paid by issuing them at discount. The period for which they are in force is called Usance." Interest on these bills is paid by issuing them at discount. The bills are usually due after three, six, nine or twelve months.

Wall Street.

American stock Exchange situated in Wall Street Newyork.

Silk fabrics.

Abrawan.	Thin silk gauze.
Amru.	It is a silk fabric woven like kamkhabī but without kalabatun—Kalabatun patterns are sometimes used on it if specially ordered.
Anqri.	Fine silk thread of Lucknow.
Banak.	Silk of Lower Bengal.
Bank Ghungru. }	Yellow silk of fine quality.
Badla.	Fabrics made of silk and badla (flattened gold and silver wire)
Charkhana.	Check cloth.
Cheoli	Old kind of silk fabric with a bright satin show having a certain amount of watery effect.
Chinia.	Twisted silk thread of Benares usually composed of 4 to 12 strands.
Chunta.	4th. quality silk thread of Lucknow.
Daryai.	Special kind of silk fabric used since the time of Akbar. It finds mention in Iin-i-Akbari. It is mostly manufactured in Farrukhabad, Meerut and Agra.
Dhup Chhaon.	Cloth made of warp of one colour and weft of another colour.
Doriya.	Striped cloth.
Durra.	2nd. quality silk thread of Lucknow.
Ghalta.	Fabric similar to Kamkhab. It is a speciality of Azamgarh as kamkhab has been specialized in Benares.
Girant.	Plain light silk fabric.
Gulbadan.	Light texture fabric with a wavy line pattern like that of Sangi.
Ilayecha.	It is a kind of Doria but more durable.
Kachar.	Coarse silk.
Kamkhabī.	A kind of brocade. It is also known as Zar baft (gold woven) and mushajjar (having patterns). It is also classed as Tipara, chaupara and etc. to Satpara according to 2 to 7 warfs used in it.

Katan.	Twisted thread of two strands.
Koya.	Very fine and bright silk.
Mashru.	It is a kind of Sangi texture in which coloured warps are used.
Mukta. } Dori. }	Inferior silk.
Pat.	Thread consisting of 2 to 12 strands.
Phul. } Kakari. }	White silk imported from China.
Pot than or Bofta.	Cloth made of silk and kalabatun but lighter than kamkhab.
Sanduki.	Yellow and coarse silk.
Sanduli. } Ghan. } Kanduri }	Kinds of silk coarser than koya.
Sangal.	Silk imported from Central Asia.
	Kinds:—
	Bardan. Used for light fabrics.
	Nawabi. Thicker than bardan.
	Bashiri. Next thicker.
	Kokani. Thicker silk used for borders.
Sangi.	A fabric with a wavy line (khanjari) running along with its width produced by the necessary manipulation of the weft thread.
Satin altas.	Thick kind of silk fabric.
Silk Nainsukh.	Plain and light silk cloth.
Susi.	A kind of charkhana.
Tanduri.	Silk of Benares.
	Varieties of Tanduri silk thread:—
	Dotana. } fine quality used for Bharna awwal. } kamkhab and zarbaft.
	Bharna. } Lower quality used Naram Bharna. } in Pitambar and Manjhala. } Dhoti.
Tasar.	A kind of silk.
Tashi.	It is a kamkhab of golden ground work and patterns of silver thread upon it.
Tirra.	3rd. quality of silk thread of Lucknow.

Stock and share market.**Arbitrage Operations.**

If different prices are ruling in two places, purchasing of commodity at one place and selling at the other is called 'Arbitrage operation.'

Badlee and Backwardation

If a speculator wants a certain transaction to be carried over to the next settlement he instructs his broker to change the transaction from the present to the next settlement. This is called "Badlee business." The charges are called 'Badlee charges.' If the tendency of the market is very favourable to the operator he gets the change at a more favourable price. Suppose A has purchased wheat at Rs. 3 per maund and the prices having fallen, he might be able to effect the change at Rs. 2/8 per maund. This is called 'Backwardation'.

Face value or nominal value.

It is the value given on the face of a security.

Gilt-edge security.

A first class security which is likely to yield good profits.

Industrials.

Industrial concerns.

Market value.

Value at which the security can be sold in the market. If it sells at more than its nominal value it is said to be selling 'at premium.' If the market value is less than face value it is said to be 'at discount.' If the two values are equal it is said to be 'at par.'

Script.

Any kind of security

S. L. or S. O. L.

Small lots or small odd lots. These abbreviations are often attached to prices quoted showing that little business was carried on and the price should not be taken as a fair index of the trend of the market.

x. d.

Ex dividend. It means that the dividend is not included in the quotation of the price of the stock and the buyer will not get any dividend.

x. i.

Ex interest. It means that the price is exclusive of the interest accrued.

Ex New

Sometimes the shares of a company carry with themselves right to subscribe for new shares of the same company at lower prices. When 'Ex New' is attached to the price of a share it means that the buyer shall have no such right.

Ex right or privilege.

When attached to the price of a share means that the buyer shall not be entitled to special rights *e. g.* participation in any bonus distribution.

Ex All.

It means that the buyer is deprived of all the special privileges carried with the share.

Yield.

Yield of a share means the percentage of return to the price paid for it. "Flat Yield" is the income obtained from interest alone disregarding any profit or loss on redemption. 'Redemption Yield' means the income from interest plus or minus the profit or loss on repayment of the security.

Wire and Tinsel trade.**Badla.**

Fine gold or silver ribbon.

Gokhru.

It is made of two flat wires, twisted over one another and bent at intervals to give the appearance of the thorny seeds of Gokhru plant. It is used for making raised flowers or brocades.

Gota.

Gold or silver lace.

Kalabattun.

Twisting gold and silver wire round silk thread. It is used in wearing brocades.

Kamdani.

Embroidery of silk, satin or cotton with gold wire (bodla).

Kamkhwab.

Brocades woven of kalabatun and silk. In zardozi and kamdani work the pattern is impressed on the silk and is then worked out by the hand. In kamkhab the pattern is produced by weaving.

Kandila Kashi.

Beating out of a bar of silver or of silver coated with gold leaf and pulling it into a thick wire.

- Lace.** Made of badla and kalabatun. Its kinds are Bakuri, Patri, Champa, Jhalar, Kaitun, Kangam and Paimuk.
- Pattha.** Broad Gota. It may be simply plain or thappadar *i. e.* patterns impressed on the pattha.
- Salma.** Giving the wire a special form.
KINDS OF SALMA.
 (i) Khardar or chaupahal ka khardar. This is coarser than ordinary Salma and is wound round a four sided needle with the result that it becomes four sided.
 (ii) Motiya. This is made of round thin wire (tar) and is closely twisted on a very fine needle so that Salma in this stage is very thin and closely coiled.
 (iii) Dabka hua Salma. It is like motia but made of flattened wire and not so closely coiled.
 (iv) Kora—This is made of very thin round wire thinner than motia. It is wound round a thin needle more closely.
 (v) Bhagli—It is made of flat wire but is round and not four sided-like khardar.
- Sitara.** Beating wire pieces into star shapes.
KINDS OF SITARA.
 (i) Chamki—is a small spangle with a fine hole in the centre.
 (ii) Katari or Tikuli.—is a cup like spangle.
- Tardalikana.** Beating round wire into flat ones.
- Tar Kashi.** Pulling of thick wire into thin wires.
- Zardozi.** Embroidery of silk, satin or velvet with Bodla, Salma and Sitara.

**THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.**

DATE LOAND

Class No. _____ **Book No.** _____

Vol. _____ **Copy** _____

Accession No. _____

--	--	--

INDEX

[Headings in italics refer to the English Mercantile usages.]

- Acceptance of a hundi, 193**
 - what is, 193
 - essentials of, 152, 193
 - kinds of, 193
 - conditional acceptance, 193
 - qualified acceptance, 194
 - as to time, 194
 - as to place, 194
 - as to parties, 194
 - partial acceptance, 194
 - who can accept, 195
- Acceptor for honour, 153**
 - essentials of, 193, 195
 - rights and liabilities of, 162
- Account settled, 266**
 - definition of, 266
 - what is not, 267
 - re-opening of, 267, 268
 - when cannot be re-opened, 269
 - extent of, 269
- Account stated, 270**
 - meaning of, 270
 - essentials of, 271
 - varieties of, 273
 - limitation for, 273
- Agent, 171**
 - rights of 171
 - right to bind principal, 171
 - right to receive payment, 173
 - right to receive notice, 174
 - right to delivery of instrument, 175
 - right to endorse, 175
 - right to accept, 175
 - liabilities of, 175
 - liability in excess of authority, 175
 - liability on signing, 175
- Agent for collection, 176**
- Agent's custom in Calcutta, 296**
- Agricultural customs, 304*
- Ankara, 241**
- Ankara Bahi, 251**

Arbitration tribunals, 280

- future disputes, 284
- matter in dispute, 286
- unnamed arbitrator, 288
- scope of paras 17 and 20, schedule II C. P. C. 289
- award in illegal contracts, 290
- persons entitled to contract for arbitration, 290
 - munib, 290
 - partner, 291
 - member of joint Hindu family, 291
- conflict of jurisdiction, 292
- regular suit to enforce award, 295

Architects, 305**Arhatia, 14**

- meaning of, 17
- duties of, 34-50
 - duty to carry out instructions, 34
 - duty to follow market custom, 36
 - duty to exercise due care, 36
 - duty to keep and render account, 39
 - duty to seek instructions, 46
 - duty to pay all money, 46
 - duty not to use information obtained in the course of business, 47
 - duty not to set up adverse title, 47
 - attachment of defaulting agent, 48
 - liability for agents and sub-agents, 48
 - duty not to deal on his own account, 48
 - liability for personal performance, 50
- rights of, 50-59
 - right of remuneration, 50
 - when arises, 51
 - right of lien, 53
 - lien in illegal transactions, 54
 - sub-agents lien, 55
 - extent of lien, 55
 - when lien becomes extinct, 55
 - right of indemnity, 56
 - right to enforce contracts, 58
 - right to call margin money, 58
- liability of the constituent to third persons, 59-69
 - bound by the acts of the agent, 61
 - ostensible authority, 61
 - ratification by principal, 62
 - misrepresentation and fraud committed by agent, 63
 - information of the agent binds the principal, 64
 - liability of undisclosed principal, 67
 - liability along with agent, 67
 - claim subject to equities, 69
- liability of arhatia to third persons, 70-75
 - personal liability, 70
 - liability for breach of warranty, 72
 - acting for himself cannot enforce contract, 75

- kachcha arhatia, 26
 - nature of, 27
 - incidents of, 29
 - pakka arhatia, 17
 - conception of, 18
 - incidents of, 24
 - compared with mercantile agent, 33
 - distinction between kachcha and pakka arhatia, 30
 - comparison of pakka and kachcha arhatia with *del credere* agent, 31
 - Comparison between pakka arhatia and his client with purchaser and seller, 34
 - difference between pakka arhatia and broker with personal liability, 34
 - limitation for pakki arhat transaction, 44
 - pakka arhatia and wagering contract, 75
 - validity of the usage of, 75
 - burden of proof of the usage, 81
- Auctioneers*, 305
- Bacon trade*, 305
- Badni transaction**, 92
- Bahi khata**, 16, 254
 - evidentiary value of, 254
 - value of various kinds of Bahis, 262
- Barley and malt trade*, 305
- Batai**, 16
- Bear**, 91
- Bech ka Sauda**, 91
- Bijak**, 92, 243
- Bilti Bahi**, 251
- Bleachers*, 306
- Bombay Act III**, 86
- Bombay Silver Market**, 296
- Book of account**, 254
 - regular account book, 255
 - accuracy of entries in, 255
 - accounts regularly kept in the course of business, 255
 - absence of entry in, 256
 - corroboration of entry in, 257
 - plaintiffs statement, 258
 - book keeper's statement, 259
 - appreciation of value of, 259
 - value without corroboration, 260
- Book-sellers*, 306
- Bought and sold notes in Calcutta**, 296
- Brewers*, 306

Broker, 112

who is, 112

difference between broker and other mercantile agents, 112

authority of, 112

rights of, 113-125

right of remuneration, 113

when entitled to commission, 113

several brokers employed, 115

amount of remuneration, 117

right of remuneration in wagering contracts, 118

right of indemnity, 118

right of lien, 119

right of action, 119

duties of, 125

duty to contract in the name of principal, 125

duty to follow market usages, 125

duty to inform, 126

duty to exercise due care, 126

duty not to deal on his own account, 126

duty to complete bargain before claiming brokerage, 126

Broker's gala, 296**Brokerage in meta' trade in Mirzapur. 296**

Brush trade, 306

Builders, 307

Bull, 91

Butter trade, 308

Byaj Bahi, 251

Calico trade, 308

Call transaction, 101

Cancellation of a hundi, 202

Carriers: insufficiency of packing, 297

Cattle grazers in U. P, 297

Chain of middlemen, 13

Chambers of commerce, 275

Functions of, 275

to promote interest, 275

to supervise deliveries, 275

to regulate transaction, 276

to fix charges, 276

to keep schedule of prices, 278

to keep deposits, 278

defects of the system 278

to decide commercial disputes, 280

Arbitration tribunals, 280—295

Chattis in Garhwal division, 298

Chitthi Bahi, 251

Chuk, 94

Cloth trade, 308

- Coach builders*, 308
- Coal trade*, 309
- Commercial abbreviations**, 321
- Commercial terms**, 321
 - general 321
 - used in Banking and commission agency, 325
 - used in Brass and Copper trade, 327
 - used in grain trade, 327
 - used in gold and silver trade, 331
 - used in lac and shellac trade, 332
 - used in money market, 335
 - used in silk fabrics, 337
 - used in stock and share market, 339
 - used in wire and tinsel trade, 340
- Composition instances of**, 164
- Consideration of hundi**, 196
 - failure of, 196
 - partial failure, 198
- Corn trade*, 309
- Cottage industries marketing**, 15
- Cotton trade*, 310
- Cotton trade in Tuticorin**, 298
- Cotton Satta in Bombay**, 298
- Custom**, 7
 - nature of, 7
 - custom and law, 7
 - custom and prescription, 8
 - essentials of, 8
 - trade custom 9
 - pleading of, 9
 - proof of, 10
 - effect of, 11
 - classification of, 13
- Cycle trade*, 310
- Daskhat**, 159
- Dealings in future**, 83
 - kinds of, 83
 - double option, 103
 - failure to exercise the option, 106
- Del credere agent**, 21, 22, 31, 32, 33, 112
- Deorha**, 16
- Diamond trade*, 310
- Diary**, 250
- Discharge of a hundi**, 200
 - by satisfaction, 204
 - by operation of law, 204
 - by material alteration, 205
 - what is, 205
 - instances of, 206
 - what is not, 207
 - effect of, 209

Dishonour of a hundi, 211

- by non acceptance, 212
- by non payment, 212
- notice of dishonour, 213
 - object of notice, 214
 - who can give, 214
 - to whom given, 215
 - necessity of, 216
 - mode of giving, 216
 - contents of, 217
 - how sent, 218
- consequences of default, 218
- when unnecessary, 219

Deya or lamp in a khatti, 299**Doctrine of estoppel, 61****Donee of a hundi, 177**

- rights of, 177

Drawee of a hundi, 152

- rights of, 159
 - right to refuse, 159
 - right to production, 160
 - right to get back hundi on payment, 160
 - right to get time, 160
 - right to re-issue bill, 160
- liabilities of, 160
 - liability to pay, 160
 - liability in case of forged endorsement, 160
 - liability to pay to a shah, 161
 - liability to enquire, 161
 - additional liability in case of shahjog hundi, 161
 - liability in case of forged hundi, 161

Drawee in case of need, 152**Drawer of a hundi, 152**

- rights of, 158
- liabilities of, 158
 - liability to compensation, 158
 - liability to enter particulars, 159
 - secondary liability of drawer, 159

Drug trade, 310***Dry goods trade, 310*****Estate agents, 311****Exchange Banks in Calcutta. 299****Financing agencies, 15**

- sahukars, 15
- kothiwalas, 16
- banking agencies, 16

Fruit trade, 311***Fur trade, 311******Glovers, 311***

Hat trade, 311

Hop trade, 311

Horse dealers, 312

Horse racing, 313

Hundi, 129

advantages of, 129

acceptance of, 152,, 193

what is, 193

essentials of, 193

kinds of, 193-194

who can accept, 195

acceptance for honour, 153

essentials of, 153, 195

rights and liabilities of acceptor for honour, 162

cancellation of, 202

component parts of, 130

consideration of, 196

failure of, 196

partial failure, 198

delivery of a hundi, 181

nature of, 181

actual delivery, 181

constructive delivery, 182

delivery by post, 183

persons entitled to make, 183

discharge of, 200

by satisfaction, 204

by operation of law, 204

by material alteration, 205

what is, 205

instances of, 206

what is not, 207

effect of, 209

dishonour of, 291

by non acceptance, 212

by non payment, 212

notice of dishonour, 213

object of, 214

who can give, 214

to whom given, 215

necessity of, 216

mode of giving, 216

contents of, 217

how sent, 218

consequences of default, 218

when unnecessary, 219

distinction between

hundi and promissory note, 142

hundi and bill of exchange, 142

hundi and cheque, 147

jokhami and shahjog hundi, 140

drawee of a hundi, 152

rights of, 159-160

liabilities of, 160-161

- drawee in case of need, 152
- drawer, 152
 - rights of, 158
 - liabilities of, 158, 159
- donee, 177
 - rights of, 177
- endorsement of, 179
 - nature of, 180
 - forged endorsement, 195
- holder of a hundi, 162
 - rights of, 162
 - right to get duplicate, 162
 - right to reserve right, 163
 - right in case of ambiguous instruments, 165
 - right to payment, 165
 - right to acceptance by all the drawees, 167
 - right in case of dishonour, 167
 - right to refuse acceptance, 168
 - right to fill up blanks, 168
 - right in case of defective hundis, 168
 - duties of, 168
 - duty to give notice of loss, 168
 - duty to present for payment, 168
 - duty to present for acceptance, 169
 - duty to make due search, 169
 - not bound to take acceptance of agent, 169
 - bound to accept payment, 169
 - liability in case of defective hundi, 170
- holder in due course, 156
 - privileges of, 170
- khari hundi, 189
- kinds of, 131
 - darshani hundi, 131
 - its form, 131
 - muddati hundi, 133
 - its form, 133
 - shah jog hundi, 134
 - its form, 135
 - nam jog hundi, 135
 - nishan jog hundi, 135
 - dhani jog hundi, 135
 - its form, 135
 - firman jog hundi, 136
 - jokhmi hundi, 136
 - its form, 136
 - nature of, 136
 - jawabi hundi, 137
 - zikri chit, 137
- maturity of, 184
 - days of grace, 184
 - method of calculation, 185
- negotiation of, 178
- parties to a hundi, 152
 - rights and liabilities of, 139

- payer of a hundi, 201
 - rights of, 201
- presentment of hundi, 186
 - method of, 187
 - who can present, 188
 - to whom presented, 188
 - time of, 189
 - place of, 190
 - when excused, 190
 - when unnecessary, 190
 - effect of non-presentment, 192
- presumptions about 225—228
- release of, 203
- rules of estoppel about, 228, 229
- shah jog hundi, 134, 140
 - nature of, 141
 - nature of attested shah jog hundi, 230
 - is shah jog hundi payable to bearer, 144
 - peculiarities of, 148
- special rules about, 221—223
- suit on original consideration of a hundi, 162

Inn keepers, 314

Interest

- system of calculating, 252
- adhikmas, 253
- miti kata byaj 253
- katua byaj, 253
- sada byaj 253
- kachcha ank, 253
- pakka ank, 253

Iron and coal trade, 313

Jama Bahi, 250

Jute bales, 300

- method of examining and calculating damages, 300

Kachcha and pakka bidding by agent, 299

Karkhana, 16

Kharid ka sauda, 91

Khata, 237

- khatiana, 237
- kinds of, 238
 - mool dhan khata, 238
 - batau hundiawan khata, 239
 - mal khata, 235, 239
 - kharch khata, 240
 - uchant khata, 240
 - batta khata, 240
 - hamare gharu khata, 240
 - tumhare gharu khata, 240
 - customers khata, 240
 - vridhhi khata, 240
 - personal khata, 240
 - kachcha and pakka khata, 241

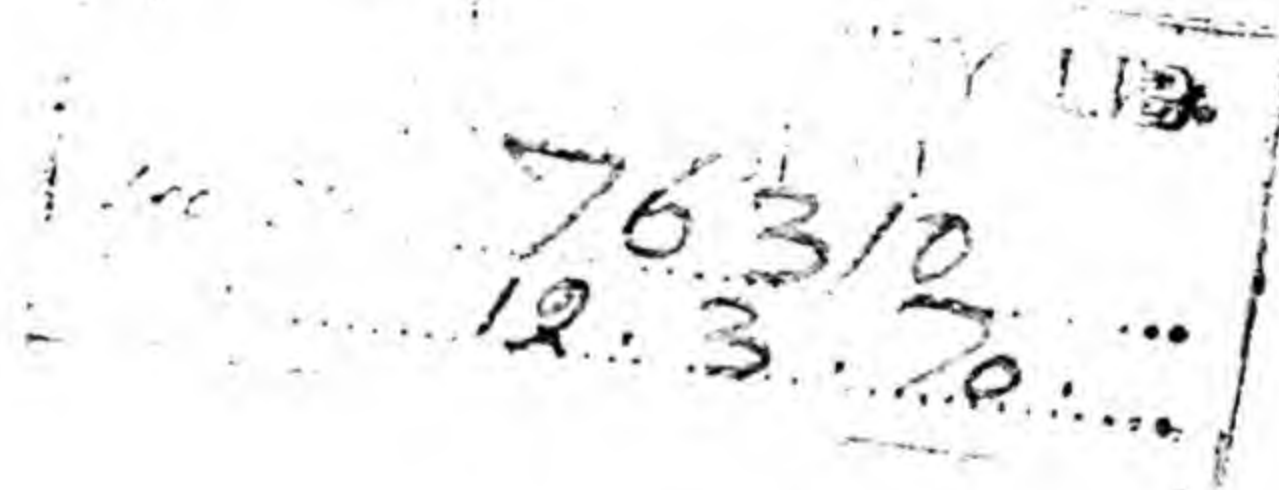
- Khatti, 93
- Khokha, 137
- Langot, 93
- Large scale dealer, 15
- Law and custom, 7
- Linen trade*, 314
- Local usage to exclude the liability of agent, 176
- Majar nama, 137
 - its form, 138
- Mandi, 95, 96
- Marketing agencies, 13
- Material alteration in a hundi, 205
 - what is, 205
 - instances of, 206
 - what is not, 207
 - effect of, 209
- Miti Bhao, 93
- Monda Bahi, 250
- Mutual open and current account, 262, 263
 - open and current account, 262
 - mutual account, 263
 - instances of, 264
 - test of, 265
- Nakarai Sikarai charges, 224, 225
- Naqal Bahi (Jakar Bahi), 241
 - ankara jama kharch, 241
 - bijak jama kharch, 242
 - upana jama kharch, 242
 - entries of forward transaction, 243
 - entries of bijak, 243
 - bikri jama kharch, 244
 - entries of settlement 245
 - kachcha and pakka naqal, 249
- Naya Nugar Arath, 300
- Nazrana, 92, 94, 99
- Nazrana contract, 111
- Nazrana Khanewala, 92
- Nazrana Puch Gaya, 107
- Negotiation of a hundi, 178
- Noting and protest, 221
- Oil and oil seeds trade*, 314
- Ostensible authority, 60
- Packing trade*, 315
- Payee of a hundi, 154
 - entitled to sue, 155
 - entitled to payment, 165
- payer of a hundi, 201
 - rights of, 201

- Payment of a hundi, 200
 - how made, 200
 - by whom to be made, 200
 - to whom made, 165
- Payment of price to metal traders at Mirzapur, 300
- Perpeth, 137
 - its form, 138
- Peta, 232, 242
- Peth, 137
 - its form, 138
- Piano trade*, 315
- Pottery trade*, 315
- Prescription and custom, 8
- Presumption of a hundi, 225
 - as to consideration, 225
 - as to date and place, 227
 - as to time of transfer, 227
 - as to order of endorsement, 227
 - as to stamp, 228
 - as to protest, 228
- Printing trade*, 315
- Provision trade*, 315
- Purza, 137
- Put-call, 101
- Put transaction, 101
- Rajuat book, 28
- Ratification, 62, 121
 - its nature, 121
 - ingredients of, 121
- Reasonable care, 37
- Release of a hundi, 203
- Rice trade*, 316
- Rokar (cash book), 232
 - kachchi and pakki, 232
 - entries in, 233
 - rokar milana, 233
 - batau or discount, 234
 - entries of credit in, 235
- Roznawan, 249
- Roznamcha, 249
- Rules of estoppel about negotiable instrument, 228
 - against denying validity, 228
 - against denying capacity, 229
 - against denying signatures, 229
- Sai, 94
- Sans recourse, 158
- Sauda book, 28
 - kachcha sauda book, 28

- Sauda Bahi, 250
- Sauda khata, 250
- Servants*, 316
- Shah jog hundi, 134
 - distinction between shah jog and jokhmi hundi, 135
 - is shah jog hundi payable to bearer, 144
 - nature of attested shah jog hundi, 230
 - peculiarities of, 149
- Shellac trade, 301
- Signs and notations of Bahi khata, 251
- Single option, 101
- Special rules of bills of exchange, 221
 - about interest, 221
 - about burden of proof, 222
 - about reasonable time, 222
 - about compensation, 223
- Speculation, 83
 - advantages of, 83
- Speculative transaction, 92, 107
- Sri Nishani, 159
- Stock exchange broker, 301
- Stone trade*, 316
- Suit for accounts, 40
 - place of accounting, 41
- Suit on original consideration of a hundi, 209
- System of Bahi khata, 231
 - nam jama, 231
- System of calculating interest, 252
 - adhikmas, 253
 - miti kata byaj, 253
 - katua byaj, 253
 - sada byaj, 253
 - kachcha ank, 253
 - pakka ank, 253
- Tampering the market, 94
- Tea and coffee trade*, 317
- Teji, 95
- Teji-Mandi, 94, 96, 107
- Teji-Mandi dab gai, 107
- Teji-Mandi laganewala, 99
- Teji-Mandi khane wala, 99
- Teji wala, 91
- Timber trade*, 317
- Tikur batai, 16
- Tobacco trade*, 318
- Tulai system in U. P., 303
- Usage, 11

- definition of, 11
- characteristics of, 11
- difference between custom and usage, 12
- usage and contract, 12
- proof of, 13
- classification of, 13
- Usage of Bombay importer, 303**
- Vaida, 99, 101**
- Vyopari, 14**
 - species of, 14
- Wagering contract, 75, 85**
 - English law of, 86
 - Indian law of, 86
 - ingredients of, 87
 - collateral agreements in, 89
- Ware house men and whare fingers, 318*
- Weaviny trade, 319*
- Whaler, 319*
- Wine and Spirit trade, 319*
- Wool trade, 320*
 - Australian wool trade, 320*

G. 1. 9
Advocate's Court
January 1901
Sunderland



**THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.**

DATE LOAND



Class No. _____ **Book No** _____

Vol. _____ **Copy** _____

Accession No. _____

--	--	--

THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

Class No.  Book No. 

Vol. _____ Copy _____

Accession No.

**JAMMU & KASHMIR UNIVERSITY
LIBRARY.**

DATE LOAND

Class No. _____ **Book No** _____

Vol. _____ **Copy** _____

Accession No. _____

--	--	--

S. N. B.
Advocate High Court
Jammu & Kashmir
Srinagar.

THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOANED

Class No. [REDACTED] Book No. [REDACTED]

Vol. _____ Copy _____

Accession No. [REDACTED]

Srinagar.
Jammu & Kashmir
Advocate's Court
S. N. S.